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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,

Respondents.

BRIEF FOR RESPONDENT, UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

SILAS H. STRAWN,
RALPH M. SHAW,
FRANK H. TOWNER,
Counsel for said Respondent.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,

Respondents.

BRIEF FOR RESPONDENT, UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

STATEMENT.

MAY IT PLEASE THE COURT:

This suit was brought by petitioners against the Director General of Railroads, as agent for a large number of railroad companies (hereinafter called the Director General), and the Union Stock Yard and Transit Company of Chicago (hereinafter called the Yards Company), in the District Court of the United States for the Northern District of Illinois, Eastern Division, un-

der Section 16, paragraph 2, of the Interstate Commerce Act (41 Stat. L. 491), to recover the sum of $140,001.25, which amount had been awarded to petitioners by the Interstate Commerce Commission (hereinafter called the Commission), as reparation on account of the collection by respondents of certain charges for loading and unloading live stock at the Union Stock Yards in Chicago. In addition, the declaration asked for interest on the amount of the award at 6 per cent per annum and a reasonable attorney's fee. Petitioners are commission men and firms at the Union Stock Yards in Chicago, buying and selling live stock on commission, and are members of the Chicago Live Stock Exchange, a corporation.

Upon the trial in the District Court, the court directed a verdict in favor of the defendants (respondents here) on the ground that the plaintiffs (petitioners here) were not the parties damaged by the collection of the charges assailed and that they could not recover, either in their own names or as factors and agents for the shippers. Many other defenses were also urged by both respondents, but the court did not find it necessary to deal with them. The opinion in the trial court is reported at 39 Fed. (2d) 80, and is printed at pages 60 to 77, inclusive, of the record. There was a subsequent memorandum opinion of the District Court dealing with a motion to amend the petition, filed by petitioners after judgment in the District Court. It is printed at pages 112 to 118 of the record. The motion to amend was denied but no point is made in this court of that action.

Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of the District Court was affirmed. The opinion of the Circuit Court of Appeals is reported at 51 Fed. (2d) 620, and is printed at pages 389 to 399 of the record. The judgment of the District Court was not affirmed on the ground assigned in the

opinion of that court, but on the ground that since neither defendant (respondent) had collected any amount in excess of those authorized by their tariffs on file with the Commission, and since the Commission had not found that any charge collected by either defendant (respondent) was unreasonable or otherwise improper, there could be no recovery. The same defenses to the action were urged in the Court of Appeals as in the District Court, but the latter court also found it only necessary to deal with one of them. A writ of certiorari was granted by this court on January 25, 1932. (R. 413.)"

The proceedings before the Commission covered the period from May, 1917 to November, 1928. Some thousands of pages of evidence were taken by the Commission and many exhibits were introduced in the hearings before it. No less than six reports and orders were made by the Commission in the process of attempting to dispose of the issues presented to it. All of this record, so made before the Commission, was introduced upon the trial of this cause in the lower court and is before this court, either in the printed record or as original exhibits. The statement of facts contained in petitioners' brief is not sufficiently complete to inform this court with respect to the basis in fact for some of the contentions made by the Yards Company, and in some respects is incorrect. We shall, therefore, supplement and somewhat enlarge that statement.

In 1867, shortly after its organization, the Yards Company installed a charge of 50 cents per car for loading all live stock shipped from the yards and a charge of 25 cents per car for the unloading of each carload. In both cases, the service was performed by employees of the Yards Company, which also owned the platforms, chutes and other facilities used. These charges were paid to the Yards Company

by the railroads handling live stock into and out of the yards, from the time they were first established until January 1, 1919, and were not collected by the railroads from the shippers or consignees. (R. 124.) Prior to 1897 the Yards Company also owned and operated the railroad which served the stockyards, but after this railroad was leased to the Chicago Junction Railway in 1897, the only service performed by the Yards Company with respect to the live stock, and here in issue, was the loading and unloading service.

Up to the time of the decision in *U. S. v. U. S. Y. & T. Co.*, 226 U. S. 286, the loading and unloading charges of the Yards Company had not been contained in any tariff filed with the Commission, but after that decision, the Yards Company published and filed with the Commission its Tariff No. 1, I. C. C. No. 1, stating its charges of 25 cents and 50 cents per car for unloading and loading live stock at the stockyards in Chicago. (Part of Ex. 1, attached to Deft's. Ex. 1, certified to this court.) This tariff remained in effect without change until May 21, 1917, and the railroads continued to pay the charges of the Yards Company provided for therein, under authority of absorption provisions contained in their own tariffs.

At all times, the only service performed by the Yards Company was the actual loading and unloading. All inbound shipments were brought by the line-haul railroads to the unloading chutes of the Yards Company. Upon the placement of the car at the chutes, the live stock in the car was unloaded by employees of the Yards Company into pens owned by and located upon property of the Yards Company. For this service, the 25-cent charge was made. In the case of outbound traffic, the empty car was placed at the loading chutes of the Yards Company and the stock was loaded by its employees.

For this service, the 50-cent charge was made. In no case did the Yards Company perform any service in actually moving the live stock in transportation.

Early in 1917, the Yards Company published its Tariff No. 2, I. C. C. No. 2, which became effective May 21, 1917, and in which it increased its charge for unloading live stock from 25 cents to 50 cents a car and increased its charge for loading live stock from 50 cents to 75 cents per car. (Part of Ex. 1 attached to Deft's. Ex. 1, certified to this court.) Inasmuch as the tariffs of the line-haul carriers only provided for the absorption and payment by them of the lower charges of 25 cents and 50 cents a car, the increase in the charges of the Yards Company of 25 cents per car, was added to the railroad freight bills and paid by the shippers. This situation immediately caused trouble, as the shippers objected to the payment of the additional charge.

Later in 1917, the Yards Company filed with the Commission its Supplement No. 1 to its Tariff No. 3, I. C. C. No. 6, effective September 1, 1917 (part of Ex. 1 attached to Deft's. Ex. 1, certified to this court), in which it undertook to cancel the tariff containing its charges of 50 cents and 75 cents per car for unloading and loading. Had this supplement been permitted to become effective, the Yards Company would no longer have had any tariff on file with the Commission stating its charges for loading and unloading. The tariff, however, was suspended by the Commission and was thus prevented from becoming effective; the proceeding which resulted from the suspension of the tariff being known before the Commission as its Investigation & Suspension Docket No. 1118.

Following this action of the Commission in suspending the proposed cancellation of the tariff charges of the Yards Company, there was filed with the Commis-

sion, on November 17, 1917, the complaint of the Chicago Live Stock Exchange (Defts'. Ex. 2; R. 243), which complaint was docketed by the Commission under its Docket No. 9977. This complaint named 27 line-haul carriers, the Chicago Junction Railway Company and the Yards Company as defendants. (R. 244.) The complainant was described as being an association of persons, firms and corporations incorporated under the laws of Illinois, its membership consisting of live stock commission merchants, doing business at the stockyards in Chicago, and it was stated that the complaint was brought on behalf of the members of the complainant, severally and collectively. (R. 245.)

After setting up the long existence of the 25-cent and 50-cent charges for unloading and loading live stock, the increased charges of 50 cents and 75 cents per car which became effective on May 21, 1917, and the attempt by the Yards Company to cancel its tariff charges for loading and unloading, the complaint generally alleged that the collection from the shipper of any amount for the service of loading and unloading was discriminatory and otherwise unlawful; that the legal duty rested upon the line-haul carriers to load and unload such stock at the stockyards, and that the failure of the line-haul carriers to absorb the increased charges of the Yards Company had subjected the members and patrons of the complainant corporation to the payment of charges for transportation that were in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce.

This complaint concluded with a prayer that the defendant carriers be required to desist from collecting from complainant's members and patrons any charges for the service of loading and unloading live stock at the stockyards, and that such defendant carriers also be required to pay to complainant's members and pa-

trons, by way of reparation, any such amounts that they had been required to pay since the increased charges of the Yards Company had become effective. This complaint was consolidated with Investigation & Suspension Docket No. 1118 for hearing, the transcript of the evidence before the Commission on the hearings being introduced in the lower court as Defendants' Exhibits 5 and 6. (R. 268.) Defendants' Exhibits 12 to 22, inclusive (R. 271 to 276) are all the exhibits offered in these hearings before the Commission. On this record, the Commission made its first report, dated February 11, 1919, at 52 I. C. C. 209. (Pltfs'. Ex. 1, R. 121.)

On this report, the Commission found that the Yards Company was performing a common-carrier service in loading and unloading live stock; that it should not be permitted to cancel its tariff charges for performing this service; that the duty of loading and unloading live stock at the stockyards rested upon the shipper and that the failure of the line-haul carriers to absorb the charges of the Yards Company did not prejudice shippers to the Chicago stockyards. The complaint was therefore dismissed, and by subsequent order dated March 13, 1919, the Commission required the Yards Company to withdraw its proposed cancellation of its tariff charges for loading and unloading. (Par. 33 of Defts'. Ex. 1, R. 237, 243.) The effect of this decision was to require the Yards Company to continue to charge and collect its tariff charges of 50 cents and 75 cents per car for its unloading and loading service.

With respect to the service, the Commission held that a fair price could be exacted for its performance (R. 136); that no attempt had been made to prove that the charges of the Yards Company were unreasonable (R. 135); and that since the Yards Company in performing the loading and unloading service was performing a

common-carrier service, its charges therefore should be published with the Commission in tariffs, in compliance with Section 6 of the Act to Regulate Commerce and the appropriate tariff circulars of the Commission. (R. 137.) In accordance with this decision, the Yards Company withdrew its tariff in which it undertook to cancel its charges of 50 cents and 75 cents per car for unloading and loading live stock and continued to collect these charges. (Par. 33, Defts'. Ex. 1, R. 243, 237.)

Thereafter, upon petitions for rehearing filed by the Chicago Live Stock Exchange and the Yards Company, the Commission reopened its Dockets 1118 and 9977 and further hearings were held on May 20, 21 and 22, 1919, the transcript of evidence taken on these hearings being introduced as Defendants' Exhibit 7 (R. 269), and the exhibits offered thereon being introduced as Defendants' Exhibits 23 to 35, inclusive. (R. 276-282.) On this additional record, the Commission issued its further report under date of July 15, 1920, at 58 I. C. C. 164. (Pltfs'. Ex. 2, R. 141 *et seq.*)

In this report, the Commission reversed its previous finding that it was the duty of the shippers to load and unload stock at the Chicago yards, and held that this was a duty imposed upon the carriers under the law (R. 144); that since this service was a part of the transportation of live stock, the collection of separate charges therefor from the shippers in addition to the line-haul rates was an unlawful and unreasonable practice (R. 145), and that the shippers who paid and bore the charges for such loading and unloading, and who were parties of record to the case, had been damaged and were entitled to reparation with interest. (R. 146.)

With respect to the charges of the Yards Company, the Commission held that inasmuch as the obligation to load and unload live stock at the stockyards was in-

cluded in the transportation and no extra charge could be made for the service, it was not necessary to pass upon the reasonableness of the established charges of the Yards Company for that service; that it (the Commission) had jurisdiction over those charges and could consider their propriety at any time, upon complaint of any party. (R. 145.) It should be borne in mind that at the time of this decision, the increased charges of the Yards Company in the amount of 50 cents and 75 cents a car were in effect in a tariff on file with the Commission, pursuant to the requirements of the Commission's first report and had been collected since May 21, 1917, in accordance with that tariff.

In considering these two reports, a number of important facts should be borne in mind. One is that at no time had the propriety of the tariff charges of the Yards Company, as increased on May 21, 1917, been put in issue or questioned by any party. The Yards Company had attempted to cancel them as a matter of tariff publication, but was prevented from doing so by the Commission. Moreover, as appears from the first report of the Commission, the Chicago Live Stock Exchange did not, in its complaint filed in Docket 9977, attack the reasonableness or propriety of those charges. Nor did the Commission, in either report, hold them to be improper. On the contrary, in its second report, the Commission said it was not necessary to pass upon their reasonableness. Notwithstanding these facts, the Commission in its second report, recognized the right of the shippers to recover, as reparation, that portion of the increased charges of the Yards Company which had not been absorbed by the railroads.

Another fact is that in neither report was there any statement or finding that the line-haul rates of the Director General were unreasonable or otherwise unlaw-

ful. In fact those rates were not proven, either as to amount or application. Nor did the Commission require the Director General to absorb, out of those rates, the increased charges of the Yards Company, although this was the specific prayer of the complaint filed by the Chicago Live Stock Exchange. (Defts'. Ex. 2; R. 254, 255.)

Another fact to be kept in mind is that at the time of the Commission's second report, no shippers had as yet been named as parties complainant. The only complainant was the Chicago Live Stock Exchange, which was a corporation. Its complaint stated that it was filed on behalf of its members and patrons, but those members and patrons were not named and were not made complainants by the reference to them. The Chicago Live Stock Exchange did file with the Commission, in its Docket 9977, on June 16, 1919, a printed list described by the Commission in a subsequent report (Pltfs'. Ex. 3, R. 149), as,—

> "a printed list of farmers, stock raisers and shippers throughout the country who have made shipments to and from the Chicago market during the past two years and who have paid the charges under investigation in this proceeding."

This list was not introduced as an exhibit in the hearings before the Commission, was not served upon the defendants, and there is no evidence with respect to it. Nor was it filed as an amendment to the complaint. (R. 295.) In the first two reports of the Commission, the only reference to the shippers is the statement that reparation was due to those of them who had paid and borne the charges for loading and unloading and who were parties of record. Who they were does not appear in the complaint in Docket 9977, and the record made before the Commission up to this time did not show their intervention. They had offered no evidence. So

far as the record shows, they were only in the case as a result of the filing with the Commission, without notice to defendants and without testimony, of a document which purported to be a list of them.

Another fact to be noted in connection with the first two reports of the Commission is that nowhere does there appear any finding that petitioners are entitled to recover the reparation referred to by the Commission. These petitioners, commission men at the stockyards in Chicago, had not been named. So far as Docket 9977 is concerned, it never did appear, either in the record made before the Commission or otherwise, that petitioners had any interest whatsoever in the complaint filed. The complaint was never amended (R. 295) and while it states that the membership of the Chicago Live Stock Exchange is made up of commission men, it has never appeared that petitioners were or are those commission men.

A second complaint of the Chicago Live Stock Exchange was filed on February 25, 1921, and was docketed under the Commission's number 12614. (Defts'. Ex. 3, R. 257 *et seq.*) This complaint names the Director General of Railroads as agent, the Yards Company and a large number of line-haul railroads as defendants. It contains the same allegations as the complaint in Docket 9977, in so far as the Chicago Live Stock Exchange is concerned. It then alleges the taking over of the railroads of the United States by the Government, refers to the prior complaint in Docket 9977, and the prior reports of the Commission with respect to that complaint and the issues presented in Docket 1118. It differs from the complaint in Docket 9977 in that in paragraph 4 thereof it specifically names the then members of the Chicago Live Stock Exchange who are petitioners here, and alleges that with respect to shipments of live stock

to and from the Chicago Yards they acted either as consignees or consignors or as factors or agents for the shippers of inbound shipments and the consignors of outbound shipments.

The complaint further sets up that it is filed in order to secure reparation on shipments made since the date of the filing of the complaint in Docket 9977, and refers to an Appendix A attached thereto, which is alleged to be a list of the shippers of live stock to the Yards and of consignees of live stock shipped from the Yards and who, together with petitioners, paid and bore the 25 cents per car for loading and unloading, the collection of which was provided for by the tariffs of the Yards Company but which had not been absorbed by the line-haul carriers. The list of shippers, identified as Appendix "A" to this complaint was introduced in the trial court as Defendants' Exhibit 41. (R. 287.) In concluding, this complaint prayed that reparation on account of such payments as had been made, should be ordered by the Commission to be made either to the members of the Chicago Live Stock Exchange, as factors and agents, for the use and benefit of the shippers shown in Appendix "A", or directly to said shippers.

One hearing was held by the Commission in Docket 12614, on July 14, 1921, the transcript of the evidence then taken being introduced as Defendants' Exhibit 8. (R. 269.) One exhibit was offered on this hearing, it being introduced in the trial court as Defendants' Exhibit 36. (R. 282.) On April 8, 1922, the Commission entered an order (Defts'. Ex. 4, R. 267), reopening Docket 9977 and consolidating it with Docket 12614 for further hearing. Hearings in the two cases were then held by the Commission, the transcript of testimony taken on these hearings being introduced as Defendants' Exhibits 9 (R. 270), 10 (R. 270) and 11 (R. 271). The

exhibits offered on these hearings were introduced as Defendant's Exhibits 37, 38, 39, 40, 42, 43 and 44. (R. 283-289.)

Following these hearings, the Commission made its third report on June 2, 1925, at 100 I. C. C. 266. (Pltfs'. Ex. 3, R. 147, *et seq.*) In this report, reference is made to the filing with the Commission in Docket 9977, without service upon defendants, of the list of alleged shippers to which we have referred (R. 149), and which the Commission apparently had in mind when it referred, in its second report (R. 146) to shippers which it there said were entitled to reparation. After undertaking to state the issues presented in Dockets 9977 and 12614, the report then finds that the collection of separate charges from complainants and interveners for loading and unloading live stock at the Chicago Yards, during the periods mentioned, was an unlawful and unreasonable practice. (R. 150.)

With respect to petitioners, it is said that they sought reimbursement in their own names and right and also as factors and agents for the shippers. (R. 151.) It is then said that petitioners, who are named in the report, made the shipments and paid the charges found to have been unreasonable and unlawful, and reparation is awarded to them. (R. 151, *et seq.*) The record not being sufficient to determine the amount of reparation to which each petitioner was entitled, they were directed to prepare statements in accordance with Rule V of the Rules of Practice of the Commission, which statements were to be submitted to the defendants for verification, and if not so verified, were to be filed with the Commission for a check upon the record, with a view to the entry of an order awarding reparation. The Yards Company was also authorized to waive the collection of

any loading and unloading charges provided for by its tariffs and which had accrued but had not been collected. (R. 156.)

On December 12, 1927, without further hearing, the Commission entered the order herein sued on (Pltfs'. Ex. 4, R. 157, *et seq.*), in which it named the petitioners and prescribed the amount of reparation that should be paid to each by the defendants named. With respect to this order, it was stipulated that this action is to recover only those amounts which are preceded by the designation "U. S. Y. & T. Co. and D. G." for some railroad. The amounts not preceded by the initials "D. G." are not involved. (R. 209.) The order recites that the parties had filed agreed statements with respect to the shipments (R. 158), but this statement is in error and was subsequently corrected. The order concludes by requiring the defendants named to pay the amounts listed "to the complainants shown." It thus appears that the Commission's award was not to the shippers referred to in its second report, nor to petitioners as agents, factors or trustees for those shippers.

Thereafter, on May 14, 1928, the Commission issued a supplemental report in Dockets 9977 and 12614. (Pltfs'. Ex. 5, R. 210, *et seq.*) In this report it is stated that the Yards Company and the Director General had refused to verify the Rule V statements, and that because of this refusal the complainants had filed with the Commission tabulated statements and summaries which, after being checked with the record, were used as a basis for the order of December 12, 1927. (R. 211.) The statements and summaries thus referred to are not otherwise identified, and the only certain thing about them is that they were not served upon respondents nor offered as exhibits in any hearing before the Commission.

This report of the Commission also states that since the statements filed did not show the dates the charges were paid, the period as of which interest should commence should be fixed as being the first of the month following the date of the loading or unloading of the *stock.* (*R. 211, 212.*) This report was also accompanied by an order amending the order of December 12, 1927, by making the changes to which we have referred. On November 27, 1928, another order was entered (Pltfs'. Ex. 6, R. 214, 215) making still further changes in the names of certain members of the Chicago Live Stock Exchange, petitioners here.

This comprises all of the opinions and orders issued or made by the Commission in connection with the litigation. Upon the refusal of respondents to voluntarily pay the reparation awarded by the Commission in its order of December 12, 1927, this suit was started. The suit is based upon the order of December 12, 1927. (Pltfs'. Ex. 4, R. 157, *et seq.*) The prayer is for a judgment in favor of petitioners and against respondents for $140,001.25 with interest at 6 per cent, and a reasonable attorney's fee. The amount sued for is alleged to have been paid on shipments which moved between December 28, 1917, and March 1, 1920, which is the period of Federal control of railroads.

From the foregoing, it will be observed that while petitioners designate them as unlawful, at no time was there any attack upon the reasonableness or propriety of the charges of the Yards Company, and that the Commission never did hold them to be in any way unlawful. On the contrary, when it was sought to cancel the tariff containing those charges, the Commission entered an order requiring that that tariff be maintained on file with it, in accordance with what it conceived to be the

law. In its first report, it also said there was no attempt to prove the unreasonableness of the charges (R. 135) and in its second report said there was no necessity of passing upon the point. (R. 145.)

Nor was there ever any finding or order by the Commission that the line-haul rates of the Director-General were unreasonable or discriminatory. On the contrary, the action of the Director General in not absorbing all of the charges of the Yards Company was found not to be prejudicial (R. 139) and this finding was never reversed. As a matter of fact, the line-haul tariffs and rates of the Director General were never introduced in the record, and the amount of the rates does not appear.

It is said in petitioners' brief (p. 9) that the record shows the loading and unloading charges of the Yards Company also constituted payment for numerous services other than loading or unloading. This is incorrect. The tariff of the Yards Company containing its loading and unloading charges (p. 165, Certified Excerpts from Original Exhibits), shows on its face that the charges made therein covered no other service. The charges are stated thus:

> "For loading, 75 cents per car of any capacity.
> For unloading, 50 cents per car of any capacity."

The other services mentioned in petitioners' brief (p. 11) were performed by the Yards Company, but only as part of its general stockyards activities, and were not paid for by any part of the loading and unloading charges. These additional services and any compensation the Yards Company may have received for performing them are not here in issue.

It is also said in petitioners' brief (pp. 13, *et seq.*) that petitioners paid the charges herein sued for, which are erroneously dubbed "unlawful" charges. It is true

that petitioners physically paid the charges but that is all they did do. In some cases they charged the amount paid to the shippers, whose stock they had sold on a commission basis, deducting it from the proceeds of the sale before remitting the balance. In other cases they actually paid the charges out of the shipper's money, which they had received from the sale of his cattle before bills for the charges had been received. In no case did any petitioner actually suffer any damage as a result of the payment. If anyone suffered, it was the shipper, with whose money the charges were paid. All of these statements are proven on the record made before the Commission.

For example, Rosenbaum Bros. Co., a petitioner, claimed the reparation as agent for the shipper. (Defts'. Ex. 8, pp. 48, 49; certified to this court.) The representative of National Live Stock Commission Company, a petitioner, said the amounts paid by it had been charged to the shipper and that it had no claim on its own behalf. (Defts'. Ex. 9, pp. 62-64; certified to this court.) The representative of Brown, St. John Company, a petitioner, said his company collected all charges paid by it from the shipper, by deducting the amount of them from the proceeds of sales. (Defts'. Ex. 11, p. 953; certified to this court.) It was testified that Gillogly & Company and W. W. Wilson & Company, both petitioners, deducted all charges from the proceeds of sales before the principal received anything, and that the charges herein sued for were paid with the shipper's money, and not petitioner's. (Defts'. Ex. 9, pp. 277, 363, 364; certified to this court.) The foregoing is typical of a vast amount of testimony contained in the record before the Commission. No petitioner ever sustained any damage whatsoever as a result of the collection of the charges sued for.

The record is equally clear with respect to the status of petitioners in this suit. The award of reparation sued on is to them in their own names. (Pltfs'. Ex. 3; R. 152, *et seq.*) Their petition in the District Court alleges that they are entitled to the reparation awarded (see paragraphs 1, 2, 6, 22; R. 4, 11, 18) and no mention is made of their agency or factorship for anybody. Neither the award of reparation nor the suit were based upon assignments from the shippers to petitioners, nor upon powers of attorney (Defts'. Ex. 9, pp. 316, 317; R. 270; certified to this court) although it was indicated that the powers of attorney existed. (pp. 140, 153, certified excerpts from original exhibits.) The documents, however, were not produced or proven.

Nor did petitioners assume any obligation to pass any recovery on to the shippers who actually paid the charges sued for. During the hearings before the Commission, some of the witnesses for petitioners indicated that any recovery would be handed over to the shippers (Defts'. Ex. 8, pp. 36, 37; R. 269; Defts.' Ex. 9, p. 230; R. 270; both exhibits certified to this court), but the testimony did not amount to an assumption of liability, and counsel for petitioners took the position that his clients had a legal right to collect and retain the money and were under no obligation to say what they were going to do with it. (Defts'. Ex. 9, p. 236; R. 270; certified to this court.) It is thus obvious that petitioners are here attempting to enforce a payment to them in their own right, and not as agents or factors for the shipper. Their claim necessarily is that this was the award of the Commission.

Under these circumstances, the claimed agency or factorship of petitioners (pp. 13 *et seq.* of petitioners' brief) is of little importance. The facts upon which it is based,

however, are clearly shown of record. When stock was received by the commission men, petitioners here, it was sold, all charges deducted from the proceeds and the balance remitted to the shipper. Petitioners also sometimes handled claims for damage and involving the charges on such shipments. In some instances shippers had open accounts with petitioners, but in most cases, the accounts on each shipment were closed when the balance after charges was remitted to the shipper. (pp. 90, 91, certified excerpts from original exhibits.)

SUMMARY OF ARGUMENT.

I.

The order of the Commission awarding the reparation herein sued for is *prima facie* evidence of the facts therein stated, but is not a finality. It establishes only a rebuttable presumption or rule of evidence. It is still open to respondents to interpose any defense which demonstrates the impropriety of the order or the inability of petitioners to recover thereon.

II.

In both the District Court and the Circuit Court of Appeals the Yards Company urged numerous defenses to this action. Each and every of those defenses was good in law and justified a judgment in favor of said respondent. The judgment of the District Court was based upon only one of those defenses and the judgment of the Circuit Court of Appeals was also based upon only one of those defenses, although a different one from that sustained by the District Court. The complaint of petitioners is against the judgment and not the reasoning upon which it is based. That judgment will be sustained if justified by any of the defenses urged.

III.

In the proceedings before the Commission the Yards Company contended that it was not a common carrier and was not performing a common-carrier service in loading and unloading live stock. The Commission overruled this defense. It held that the Yards Company was performing a common-carrier service in loading and un-

loading live stock, and that the law required it to maintain its charges for that service in tariffs on file with the Commission. In conformity with this ruling, the Yards Company so maintained on file with the Commission during the entire reparation period, its tariffs stating its charges for the service of loading or unloading live stock. It was, therefore, obliged under the law to collect and retain those charges and the Commission had no authority or jurisdiction to require the repayment of any part of them to any party in the absence of a finding, based upon sufficient evidence, that those charges were unreasonable or otherwise unlawful. There was no such finding and no evidence in the record upon which such a finding could have been properly based. The order sued on herein was, therefore, beyond the jurisdiction of the Commission and is invalid.

IV.

The duty to load and unload live stock at the stock yards in Chicago was an obligation of the shipper or consignee and should have been sustained by them through the payment by them of the charges of the Yards Company, assessed by it for its performance of the service. It follows, therefore, that since the shipper has only paid for this service a charge which the law obliged him to pay, the order of the Commission is invalid and there can be no recovery thereon. Even if the duty to load and unload such live stock rested upon the line-haul carriers or the Director General, as held by the Commission, there can still be no recovery in this case from the Yards Company. Such a holding, if proper, would have required the payment of the charges of the Yards Company by the line-haul carriers or the Director General. The Yards Company, therefore, has only received an

amount which had to be paid either by the shipper, the consignee or the Director General and there can be no recovery from it.

V.

Claims for reparation before the Commission and suits in court must be brought in the names of the real parties in interest. This suit is brought in the names and right of petitioners, and not by them for or on behalf of any other party. Petitioners are not the real parties in interest, either in fact or in law. They did not pay or bear the charges sued for herein and were not damaged within the meaning of the Act to Regulate Commerce. Since, therefore, they have brought this suit in their own names and right, there can be no recovery herein. Nor can there be any recovery by petitioners in the character of factors and agents for the shippers. This suit is not brought by petitioners in that capacity and could not be so brought, since the award of reparation by the Commission was not to petitioners as factors and agents. And in any event, the factorship or agency had terminated prior to the bringing of the action and no suit could have been maintained by petitioners in that capacity.

VI.

This suit is to recover reparation on shipments moving only during the period of federal control. The Yards Company never was under federal control. Notwithstanding, the Commission has awarded reparation in the order sued on herein against the Yards Company with respect to shipments which moved intrastate within the State of Illinois. It had no jurisdiction to make such an award. The record does not contain evidence sufficient to enable the court to distinguish between that

part of the reparation sued for which is alleged to be due upon interstate shipments and that part which is alleged to be due upon intrastate shipments. The Yards Company having rebutted the presumption of validity which attaches to the reparation order by showing its invalidity to some extent, the burden was upon petitioners to show the extent to which it was valid. They have failed to do this and there can be no recovery herein.

VII.

The award of reparation made by the Commission herein was made in two separate proceedings before it. In one of those proceedings, the record fails to show that petitioners were parties complainant and also fails to show how much reparation was awarded in each of the two proceedings. The order sued on is invalid in so far as it awards reparation in that proceeding in which the record fails to show that petitioners were complainants, and since there is no proof as to how much of the total award is thus invalid, there can be no recovery at all.

VIII.

The only evidence before the Commission and upon which it could determine the amount of the reparation awarded by it in the order sued on herein, was not admissible in evidence, as it was secondary, hearsay, and based upon records which were neither identified, produced or proven. The objections of the Yards Company to the receipt of this evidence in the record in the proceedings before the Commission should have been sustained. Had they been sustained, the record before the Commission would have contained no evidence showing any amount or amounts due to petitioners. The receipt of such evidence prejudiced the rights of the Yards

Company, denied it a fair hearing and amounted to a denial of due process. The order sued on is, therefore, invalid and there can be no recovery thereon.

IX.

It appears from the various orders entered by the Commission in the course of the proceedings before it that the reparation order sued on herein was made by it after a consideration of evidence which was not introduced in the record before the Commission upon any hearing, was not submitted to the respondents and with respect to which respondents were denied the right of cross-examination. In the absence of such evidence, the record before the Commission would have been insufficient to justify any award of reparation. The reparation order sued on is, therefore, invalid and there can be no recovery thereon.

ARGUMENT.

I.

THE ORDER OF THE COMMISSION SUED ON IN THIS CASE WILL NOT BE SUSTAINED AND IS INVALID UNLESS IT IS SUPPORTED BY EVIDENCE AND IS NOT CONTRARY TO LAW. THE PRIMA FACIE EFFECT OF THE ORDER SUED ON MAY BE REBUTTED, EITHER BY THE EVIDENCE SUBMITTED TO THE COMMISSION OR BY EVIDENCE SUBMITTED IN COURT.

Throughout petitioners' brief there is an intimation that neither the District Court nor the Circuit Court of Appeals have had sufficient deference for the various opinions and orders of the Commission. The fact that the Commission has made an order in this case does not mean that the proceedings in the trial court should have differed in any way from the accepted methods of trying any other suit therein, or that the trial judge should have adopted a different attitude toward petitioners than toward other litigants. There is nothing in the Act to Regulate Commerce or in any decision which justifies such a contention.

In the proceedings before the Commission, petitioners received the full benefit of the loose practice before that body, and in the District Court and Circuit Court of Appeals they received the full benefit of any presumptions of validity which attached to the order sued on. Notwithstanding the presumption of validity which attached to that order, it was, nevertheless, open to respondents to contest the propriety of the order, either by maintaining that the evidence before the Commission did not justify it, or that the Commission exceeded its power in making it.

Under Section 16 (2) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 16 to end p. 16), an order of the Commission in such a suit as this is *prima facie* evidence of the facts therein found, but this is the furthest extent to which the statute goes. This provision of the law establishes a rule of evidence only. It provides that suits such as this one

> "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated * * *."

It thus appears that under the express provisions of the law this suit should have been tried in the lower courts in precisely the same fashion as any other suit to recover damages. The order of the Commission having been given its *prima facie* effect, petitioners were in the same position as any other plaintiffs seeking a recovery and were subject to the same obligations. The precise rights of plaintiffs and defendants in such an action as this have been passed upon repeatedly by the courts. In speaking of the effect of that part of Section 16 which makes the orders of the Commission *prima facie* evidence of the facts therein stated, this court in *Meeker* v. *Lehigh Valley Railway Company*, 236 U. S. 412, said at page 430:

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence."

To the same effect are the decisions in *Williamette, etc. Co.* v. *Baltimore & Ohio R. Co.* 29 Fed. (2d) 80, 82, and *Krauss Bros.* v. *Mellon, etc.* 18 Fed. (2d) 369, 370. In this case, the Yards Company has urged, in support of the decisions of the lower courts, only those arguments

which, if correct, constitute a complete defense to this action.

II.

THE APPEAL HEREIN IS FROM THE JUDGMENT OF THE LOWER COURT AND NOT FROM ITS OPINION. THE JUDGMENT WILL NOT, THEREFORE, BE REVERSED, IF IT MAY BE SUSTAINED ON THE GROUND MENTIONED IN THE OPINION OF THE CIRCUIT COURT OF APPEALS OR FOR ANY OTHER REASON.

The motion for a directed verdict, made by the Yards Company in the trial court, was based upon a number of grounds. All were urged with equal force and with the belief that each of them was good and constituted a complete defense to petitioners' claim. Only one of these grounds was referred to by the District Court in its opinion, the court's statement with respect thereto being as follows (R. 66):

> "The defendants in their motion for a directed verdict raise many contentions which are common to both defendants and many other contentions which apply separately to the defendants on whose behalf they are made. In the view the court takes of this case it is unnecessary to summarize these various contentions or to discuss them *seriatim*."

This conclusion of the District Court was reached because in its opinion it was necessary to do no more than to pass upon the first point which had been raised. In the second opinion of the District Court, filed in the motion for leave to amend, it is said (R. 118):

> "The appeal is from the judgment of the court and not from its opinion. The court may have assigned a wrong reason for the judgment. While the court in its opinion did not advert to the other points argued by the defendants, yet it seems to the court that on other grounds, not referred to in the

opinion, the judgment of the court may be maintained."

In the Circuit Court of Appeals the same situation existed. The same defenses were urged by both respondents as in the trial court. That court also, found it necessary to consider only one of the defenses urged; one different from that upon which the judgment in the District Court was based. In cannot be doubted that if the judgments of the District Court and the Circuit Court of Appeals were right, for any of the reasons urged by respondents, those judgments should be affirmed in this court.

In *Dinsmore* v. *Southern Express Company*, 183 U. S. 115, this court said at page 121:

> "As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which the court proceeded, or any of the questions determined by it or by the Circuit Court, and the judgment must be affirmed."

On this point, see also *Camp* v. *Gress*, 250 U. S. 308, 317; *Y. & M. V. R. Co.* v. *Mullins*, 249 U. S. 531, 532; *United States* v. *Heinrich*, 16 Fed. (2d), 112, 113; *Lewis-Hall Iron Works* v. *Blair*, 23 Fed. (2d), 972, 974; *City of Newark* v. *Mills*, 35 Fed. (2d), 110, 111; *Clinton, etc., Co.* v. *Cochran*, 247 Fed. 449, 450; *Brace* v. *Construction Co.*, 36 Fed. (2d), 661, 663. We insist that the decisions of the District Court and Circuit Court of Appeals were correct on the grounds assigned in the opinions of those courts, but we call attention to this situation at this time, because we will argue to this court the propriety of the judgment herein, not only on the grounds assigned in the opinions of the lower courts but upon each and every of the grounds argued by us in both those courts.

III.

UNDER THE THEORY OF THE LAW ADOPTED BY THE COMMISSION, THE YARDS COMPANY WAS OBLIGATED TO FILE WITH THE COMMISSION ITS TARIFF CONTAINING ITS CHARGES FOR LOADING AND UNLOADING LIVE STOCK. IF THIS WAS SO, THE LAW REQUIRED THE YARDS COMPANY TO ASSESS, COLLECT AND RETAIN THOSE CHARGES. THE REASONABLENESS AND PROPRIETY OF THOSE CHARGES WAS NOT IN ISSUE IN ANY PROCEEDING BEFORE THE COMMISSION, AND THEY HAVE NEVER BEEN CONDEMNED BY THE COMMISSION. NOTWITHSTANDING THIS, THE ORDER SUED ON HEREIN OPERATED TO REDUCE THOSE CHARGES AND IS, THEREFORE, UNLAWFUL AND VOID.

The Yards Company consistently maintained in the proceedings before the Commission that it was not a common carrier, the claim being that because of changes in the conditions which existed in 1913, the decision of this court in *United States* v. *U. S. Y. & T. Co.* 226 U. S. 286, was no longer controlling. If this was so, the Commission did not have the jurisdiction which it exercised, and the order sued on is necessarily bad. The Commission, however, overruled this claim, and the order sued on was made on the theory that the Yards Company was performing a common-carrier service in loading and unloading live stock.

Pursuant to this theory, the Commission in its Investigation and Suspension Docket 1118, declined to permit the Yards Company to discontinue the publication of its tariff containing its increased charges of 50 cents and 75 cents for unloading and loading livestock, and affirmatively required the Yards Company to continue the filing with it of that tariff. This requirement was based upon the holding that as a common carrier, the

Yards Company was required, under Section 6 of the Act to Regulate Commerce, to publish and file its tariffs in conformity with the requirements of that section of the law. (Pltfs'. Ex. 1, R. 137.)

Therefore, during the entire reparation period covered by the petition herein, the Yards Company was obligated, under the Commission's decision, to collect its charges of 50 cents per car for unloading and 75 cents per car for loading live stock. Its failure to make this collection would have been a departure from the requirements of its tariff. Those charges of the Yards Company were published in its own tariffs. (Par. 1, Defts'. Ex. 1, R. 243, 233.) The railroads were never parties to those tariffs of the Yards Company (Pars. 5 and 6, Defts'. Ex. 1, R. 243, 233, 234), and the Yards Company was never a party to the rates or tariffs of the railroad. (Par. 26, Defts'. Ex. 1, R. 243, 235, 236.)

Assuming for the purpose of this argument, but without conceding, that during this period the Yards Company was performing a common-carrier service in loading and unloading live stock, the order sued on was also bad. Neither in Docket 9977 or in Docket 12614 before the Commission was there any claim that the charges of the Yards Company were unreasonable or otherwise improper. In Docket 9977, as stated by the Commission in its first report (Plfts'. Ex. 1, R. 135), the issue of the reasonableness of the charges of the Yards Company was not raised, and the failure of the railroads to absorb all of those charges was not found to be prejudicial.

In its second report (Plfts'. Ex. 2, R. 145), the Commission also stated that it was unnecessary to pass upon the reasonableness of the separately established charges of the Yards Company for loading and unloading, pre-

sumably because the Commission thought these charges would be absorbed by the railroads. Nor was there ever any condemnation of the charges of the Yards Company in any subsequent report of the Commission. In the report dated July 15, 1920 (Plfts'. Ex. 2, R. 141), the finding of the Commission was (R. 145):

> "That the collection of separate charges from the shippers for unloading or loading in addition to the rates on live stock * * * was an unreasonable and unlawful practice."

In the report of June 2, 1925 (Plfts'. Ex. 3, R. 147) precisely the same finding was made. This language is not a condemnation of the charges of the Yards Company, and indeed there could be no such condemnation, or the Commission had just finished finding that the legal obligation of the Yards Company was to maintain those charges on file with it in tariff form.

The same situation exists with respect to the Director General. As we have said, the first complaint of the Chicago Live Stock Exchange asked that the line-haul carriers be required to absorb the increased charges of the Yards Company, it being alleged that with the 25 cent increase in the Yards Company charges added to the line-haul rates, those rates were unreasonable. (R. 254-256.) The failure of the line-haul carriers to absorb those charges was also said to be discriminatory and prejudicial. (R. 256.) Substantially the same allegations were made in the second complaint. (R. 266.) The Commission held, however, that the failure of the line-haul carriers to absorb the increased charges of the Yards Company was not prejudicial (R. 139), and never reversed this finding. Moreover, it never held that the line-haul rates, plus the increase in the charges of the Yards Company, amounting to 25 cents a car, were unreasonable or otherwise unlawful and never made any

requirement that the Director General absorb the increased charges.

The reasonableness of the Yards Company charges and the line-haul rates of the Director General was never a real issue in the case. This is conceded in the brief filed herein by the Commission as *amicus curiae* (p. 6, Commission's brief). Because of this, and the failure of the Commission to find anything wrong with them, it must be considered that those rates and charges were reasonable. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 478, 479.

Notwithstanding these facts, the Commission's order either required the Director General to reduce his line-haul charges by the amount of the increase in the charges of the Yards Company, or required the Yards Company to refund one-half of the unloading charges collected by it and one-third of the unloading charges collected by it during the reparation period. Under the circumstances, such a requirement was plainly unlawful, and was properly so held by the Circuit Court of Appeals.

In holding that the Yards Company, as a common carrier, was under a legal obligation to file its tariffs containing its loading and unloading charges with it, the Commission, in its report of February 11, 1919 (Plfts'. Ex. 1, R. 121) referred to the requirements of Section 6 of the Act to Regulate Commerce. (R. 139.) This section of the law, in paragraph 1 thereof (U. S. C. A., Title 49, Sec. 1 to 15a, pp. 240, 241), provides in part as follows:

> "Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter, and print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation between differ-

ent points on its own route and points on the route of any other carrier by railroad * * *."

This language has been construed as imposing a positive duty on common carriers subject thereto, with respect to the filing of tariffs, and was so construed in the litigation which led up to the holding of this court that the Yards Company was a common carrier. *United States* v. *Union Stock Yard & Transit Company*, 192 Fed. 330, 226 U. S. 286.

In this case the Commission held that since the Yards Company was a common carrier, the provisions of Section 6 of the act required it to maintain its published tariffs on file with the Commission, and in accordance with this conclusion, the Yards Company did so maintain its tariffs during the entire reparation period covered by the order of the Commission sued on herein. If the Yards Company was a common carrier, the law required it to collect and retain the entire amount of its loading and unloading charges. In *Pennsylvania Railroad Company* v. *International Coal Co.*, 230 U. S. 184, this court said at page 196, referring to the collection of rates contained in tariffs:

> "When collected, it was unlawful under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, Sec. 2; March 2, 1889, 25 Stat. 855, c. 382, Sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless

bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The same holding was made in *Armour & Co.* v. *United States*, 209 U. S. 56, 72, and *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 418, 425. And what we have said also applies to the Director-General. At no time did the Commission ever find that the line-haul rates maintained by him were unreasonable or otherwise unlawful. He was under the same obligation to collect and retain the full amount of those rates. Yet the order of the Commission, if a payment is made thereunder, will require a reduction, either in the charges of the Yards Company or those of the Director-General.

We concede the primary exclusive jurisdiction of the Commission to pass upon the legality of rates charged by a common carrier. *Great Northern R. Co.* v. *Merchants Elevator Co.* 259 U. S. 285, 291; *A. T. & S. F. Ry.* v. *United States*, 232 U. S. 199, 220; *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477. We also concede that the decision of the Commission on such a question will not be disturbed by the courts if made after proper hearing, supported by evidence, within constitutional limits and not unreasonable or an abuse of power. *Manufacturers Ry. Co.* v. *United States, supra; Assigned Car Cases*, 274 U. S. 564, 580, 581; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Chicago Junction Case*, 264 U. S. 258. It follows that in this case the Commission might have found, had the record been sufficient, that the increased charges of the Yards Company were unreasonable; or that the addition of the increase to the line-haul rates made those rates unreasonable; or that the failure of the Director-General to absorb the increase resulted in prejudice or discrimination. As a

corollary to this right, it might have required the payment of reparation.

The fact is, however, that it did none of these things. It even held that the reasonableness of the Yards Company charges was not in issue and that the failure of the line-haul carriers or the Director General to absorb those charges was not prejudicial. A finding of illegality in the charges of the Yards Company or of the Director General was a prerequisite to the Commission's order that any part of those charges should be refunded to petitioners. *Pennsylvania R. Co.* v. *International Coal Co., supra; Baltimore & Ohio R. Co.* v. *United States,* 277 U. S. 291, 301, 302; *Florida East Coast R. Co.* v. *United States,* 234 U. S. 167. Without such a finding, the payment could not be validly required.

The Commission sought to cloak its action by a finding that the "practice" of collecting the charges was illegal. But this does not help petitioners. The Commission having failed to find any illegality in the charges of the Yards Company, or in the line-haul rates of the Director General, the law required the collection which was made. No "practice" by which those charges were collected could have been illegal. On the contrary, a failure to collect them would have been illegal.

We concede the right of the Commission, urged in its brief (p. 5) to condemn an unreasonable practice under Section 1 (6) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 79) and Section 10 of the Federal Control Act. But the condemnation must be based upon an adequate record. In *Baltimore & Ohio R. Co.* v. *United States,* 277 U. S. 291, the Commission undertook to condemn a "practice" but its action was set aside because the record did not contain evidence supporting the action taken. So in this case. The only

effect of the order made, if complied with, would be to reduce respondents' tariff charges. This cannot be done through indirection, but must result from a definite finding that those charges are unlawful. There is no such finding, nor would the record have supported one, if made. It follows that the practice of collecting those lawful charges could not have been unlawful.

From the standpoint of the Yards Company, precisely the same situation was presented in *Interstate Commerce Commission* v. *Stickney, et al.*, 215 U. S. 98. That case involved the propriety of the $2 terminal charge assessed by the Yards Company for the use by the railroads of the railroad that the Yards Company then owned, and which charge had been added by the railroad to their line-haul charges on live stock. The matter had been submitted to the Commission and in the proceedings before it, the propriety of the $2 charge had been demonstrated. Notwithstanding this proof, the Commission entered an order requiring the railroad companies to reduce the charge against the shipper to $1, which presumably would have required a decrease in the amount of the charge assessed by the Yards Company for the use of its track. This being the situation, this court held at page 109:

> "Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards is would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the

commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

The decision in *Interstate Commerce Commission* v. *C. B. & Q. R. Co.*, 186 U. S., 320, is also in point. That case also involved the terminal charge of $2. When the matter was presented to the Commission, that body had held, in effect, that considered alone, both the terminal charge and the line-haul rate were reasonable. Notwithstanding this failure to find the rates unreasonable, the Commission ordered the terminal charge to be reduced. In passing on the propriety of the order, this court said at page 339:

"In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of $2 and the through rate as reduced when separately considered were just and reasonable, and as the further finding was that as a consequence of the reduction of from $10 to $15 per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained."

The situation in the case at bar is the same as that in the cases cited. No part of the record before the Commission shows that the charges of the Yards Company, or of the Director General, were unreasonable. It is conceded that this was not an issue before the Commission. The Commission having failed to find the charges of either respondent illegal, its action in this case must be condemned just as its similar action was condemned in the *Stickney Case* and the *C. B. & Q. Co. Case, supra.* If either respondent is required to make a refund as a result of any judgment herein, it will be put in the position under the Commission's order of being required to render a common carrier service for a

lesser amount than the law authorized and required it to collect. Even the Commission cannot compel such a result. The language used in *Knudson, etc. Co.* v. *Michigan Central R. Co.*, 148 Fed. 968, is appropriate to this case. The court said at page 974:

> "The record before us discloses no finding and rulings of the Commission against the reasonableness of the rates and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage there can be no recovery."

It is obvious from the various reports of the Commission, that what that body was trying to do in this case was to require the absorption of the charges of the Yards Company by the line-haul carriers. This was the specific relief asked for in the complaint filed in Docket 9977, and was the issue dealt with in the Commission's first report. (Pltfs'. Ex. 1, R. 121, *et seq.*) That action by the line-haul carriers would also have been a complete compliance with the finding of the Commission that the collection of the Yards Company charges from the shippers, in addition to the rates for transportation, was "an unlawful and unreasonable practice." Under such a disposition of the case, the Yards Company would have been permitted and required to collect and retain its charges, in accordance with the Commission's decision with respect to those charges, but the shippers would not have been required to pay any part of them.

This conclusion is strengthened by the fact that on February 29, 1920, there became effective Section 15 (5) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426) which required the payment of the

entire charge of the Yards Company by the line-haul carriers, a circumstance referred to by the Commission in its report of July 15, 1920. (Pltfs'. Ex. 2, R. 143.) Certainly, an order requiring the line-haul carriers to absorb the charges of the Yards Company could not have been sustained on the record made in this case, which, perhaps, is the reason such a requirement was not made, but it is only on this theory that there can be any reconciliation of the various conclusions reached by the Commission.

What we have said is a complete answer to the arguments advanced by petitioners in the major portion of their brief. Those arguments are almost entirely based upon a misunderstanding of the evidence and of what the Commission actually did. We may refer to them briefly.

(1) *The Character of the Charge Collected.*

Throughout petitioners' brief, the increased charges of the Yards Company, collected from the shippers, are designated as "unlawful" or "illegal" charges. Those charges were neither unlawful or illegal, unless the assertion of counsel makes them so. Certainly, they were never held to be so by the Commission, which, as petitioners are at pains to point out, had exclusive primary jurisdiction over them if the Yards Company was a common carrier. Petitioners are forced to assume the unlawfulness of the charges collected for as we have said, no "practice" by which legal charges were collected could possibly be unreasonable or unlawful. And then, in the face of this assumption, they say at page 26 of their brief that the reasonableness of these charges is immaterial.

At pages 23 and 24 of their brief, petitioners devote

some space to the claim that they have never admitted the increased charges of the Yards Company to be reasonable or lawful. Such an admission by them is not necessary. Those charges were contained in a tariff filed with the Commission, and must be held to be reasonable and lawful in the absence of a finding by the Commission that they are not so. And there is no such finding.

(2) *The Alleged Wrong Complained of by Petitioners.*

At pages 26 and 27 of petitioners' brief, the wrong said to have been committed by the Yards Company was its alleged action in conniving with the Director General to collect the charges sued for herein from the shipper, when it had knowledge of the shipper's right to a completed transportation service, including unloading, without such payment. It is said (p. 27):

> "'The gist of the wrong done was the violation of the shipper's right growing out of the published tariffs of the line-haul carriers with whom he had contracted.''

The position here taken by petitioners is based upon a misunderstanding. During the entire reparation period here in issue, the tariffs of the Director General only provided that he would absorb 50 cents and 25 cents a car for the loading or unloading of stock at the stockyards in Chicago. They contained no undertaking with respect to the payment by him of any additional amounts. Petitioners fall into the error of assuming (p. 22, petitioners' brief) that because the line-haul carriers did absorb all of the loading and unloading charges of the Yards Company at one time, they or the Director General assumed a continuing obligation to absorb them at all times, regardless of their amount. The tariffs of the line-haul carriers, however, never contained any such un-

dertaking and the Commission did not hold that the line-haul tariffs should have contained it.

Notwithstanding the argument of petitioners (pp. 51-59, petitioners' brief) the Circuit Court of Appeals was right in holding that respondents' obligations were fixed by their tariffs. Anybody who could read could understand the tariffs. That of the Yards Company fixed its charges at 75 cents per car for unloading and 50 cents per car for unloading (p. 165, certified excerpts from original exhibits). That of the Director General said that he would pay 50 cents per car for loading and 25 cents per car for unloading (p. 169, certified excerpts from original exhibits). No question of tariff construction was involved.

The tariffs constituted notice to the world that during the reparation period, the shipper would be required to pay 25 cents per car for the loading or unloading of his stock, this being the difference between the total amount of the Yards Company charge and the absorption by the Director General. *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 98; *Keogh* v. *C. & N. W. R. Co.*, 260 U. S. 156, 163; *Louisville & Nashville R. Co.* v. *Central Iron Works*, 265 U. S. 59, 65. And the absorption provision in the tariffs of the Director General definitely fixed his obligations. (Section 7, par. (6) and (7); U. S. C. A. Title 49, Sec. 1 to 15a, pp. 282, 283). On this point the Commission also held (R. 137) that all absorptions by a line-haul carrier must be specified in its tariffs.

It follows that at no time during the reparation period did the shippers or anyone else have a right to the transportation of live stock to Chicago, including the unloading thereof, upon payment of the line-haul charge for transportation. At all times, the tariffs of the Yards

Company and the Director General provided for an additional payment of 25 cents per car for loading or unloading. Consequently, there could have been nothing unlawful in the collection of this amount from the shipper, no matter how it was actually done.

(3) *The Alleged Agency of the Yards Company.*

Petitioners contend that the Yards Company was the agent of the Director General in performing the loading and unloading service and on that ground claim that its charges were not lawful, in so far as they were collected from the shippers, although conceding that they were legally established. (pp. 59-74, petitioners' brief.) This is a contradiction in terms.

The Yards Company did contend before the Commission that in performing the loading and unloading service, it was acting as the agent of the line-haul carriers. This position was taken by it in an effort to support its claim, then being made, that it was not a common carrier. The Commission itself referred to this contention in its first decision. (Pltfs'. Ex. 1, R. 137.) The Commission, however, overruled this contention and held the Yards Company to be a common carrier and required it to publish its own tariff containing its charges for the loading and unloading service.

Under this holding, the charges constituted a legal charge against the shipments and the initial obligation to pay them rested upon the same parties who were obliged by law to pay the line-haul charge. The charges of any common carrier contained in its tariffs filed with the Commission as required by law must constitute a charge against the shipment and be payable by those parties upon whom the law imposes an obligation to pay. *N. Y. C. R. Co.* v. *York & Whitney Co.*, 256 U. S.

406, 408; *Pennsylvania R. Co.* v. *International Coal Co. supra; Keogh* v. *C. & N. W. R. Co., supra; L. & N. R. Co.* v. *Central Iron Works, supra.* If this is not so, any common carrier might restrict the application of its tariffs so as to impose the obligation to pay upon only one party to a shipment, thus relieving other parties to the transportation from the obligation to pay imposed upon them by law and perhaps relieving the carrier itself from its legal obligation to collect the charges.

Thus, if the Yards Company was a common carrier, and that was the theory of the Commission's order, the primary obligation to pay its charges rested upon the shipper. That obligation was reduced by the absorption of part of the charges by the Director General, but remained effective as to the unabsorbed balance. The Commission never held that the entire loading and unloading charges of the Yards Company should be paid by the Director General, on the theory of agency. The idea is that of petitioners.

(4) *The Alleged Determination by the Circuit Court of Appeals of the Reasonableness of the Yards Company Charges.*

At pages 74 and 75 of their brief, petitioners say the Circuit Court of Appeals erred in passing on the reasonableness of the Yards Company charges. The fact is that the court did not do so. It only said (R. 397) that it knew that the cost of the service rendered by the Yards Company had increased materially at the time the Government took over the railroads, and (R. 398) that this increased cost justified increased charges. There was no necessity for the court to pass on the propriety of the increased charges made by the Yards Company and it did not do so. Those charges were in effect at

all times during the reparation period. No one had said they were too high, and the Commission had said their reasonableness was not an issue in the case. Under these circumstances, the court would have been fully justified in holding them reasonable had it seen fit to do so.

(5) *The Absorption of the Yards Company Charges by the Director General.*

We refer to this matter to illustrate the lengths to which petitioners are impelled by their own arguments. At page 25 of their brief, petitioners insist that this case does not involve the absorption by the Director General of the charges of the Yards Company. They are compelled to assume this position because of the Commission's failure to require such an absorption. Yet they argue (pp. 30 to 51, petitioners' brief) that the obligation to pay for the loading and unloading of live stock at the Chicago stockyards rested upon the Director General, which, if true, would require him to absorb the charges of the Yards Company. They also say (p. 27, petitioners' brief) that they were entitled to the transportation of live stock, including unloading, upon payment of the line-haul charges, which necessarily means that the Director General would be required to absorb the increased charges of the Yards Company.

The only other alternative would be the failure of the Yards Company to collect its charges, and on this point, petitioners admit (pp. 71, 72, petitioners' brief) that they were legal charges, and that a common carrier, such as the Yards Company was held to be, is compelled to collect its tariff charges under penalty of law. True, petitioners also say that the Yards Company should have collected its charges from the Director General, but such a collection would have required the absorption

by the Director General of the amount so collected from him, and petitioners insist that such an absorption was not an issue in the case. To such a pass does the reasoning of petitioners lead.

Petitioners say that the reasonableness of the charges of the Yards Company and the Director General was not involved in the case before the Commission. (pp. 26, 73, petitioners' brief.) Admitting that these charges were contained in tariffs, they concede the obligation of both respondents to collect them. (pp. 71, 72, petitioners' brief.) Conceding that the Commission did not find any of these charges unreasonable, they cite *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.* 52 Sup. Ct. Rep. 183, to prove that in the absence of such a finding, the charges had to be paid, and having been paid could not be recovered.

Having thus demonstrated the completeness of respondents' defense herein, they say that the Director General should have been required to pay the charges of the Yards Company, and in the same breath say that his absorption of those charges is not involved in the case. Such arguments only serve to demonstrate the correctness of the opinion of the Circuit Court of Appeals.

Petitioners have in fact argued themselves out of court. At pages 21 and 22 of their brief, they say, after conceding the right of a carrier to separately publish its terminal charges:

> "Nor is there any doubt as to the law that such terminal charges, if reasonable in themselves, and in connection with other transportation rates produce a reasonable aggregate for the performance of the entire transportation service, are proper and will be sustained."

As we have said, the charges of the Yards Company

and the line-haul rates of the Director General must be held to be reasonable, since their reasonableness was not in issue and they were not held by the Commission to be unreasonable or otherwise unlawful. The sum of them, less the part of the Yards Company charges which was absorbed by the Director General, necessarily produced, therefore, a reasonable aggregate charge for the entire service, including unloading. It results, to use the words of petitioners' brief, that the charges "are proper and will be sustained." This court so held in a substantially similar case. *Interstate Commerce Commission* v. *C. B. & Q. R. Co. supra.*

IV.

THE DUTY TO LOAD AND UNLOAD LIVE STOCK AT THE STOCKYARDS WAS AN OBLIGATION OF THE SHIPPER OR CONSIGNEE. THE COMMISSION'S FINDING TO THE CONTRARY WAS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO LAW.

At pages 30 to 51 of their brief herein, petitioners argue that the obligation to load and unload live stock at the Chicago stockyards rested upon the line-haul carriers or the Director General. The position of the Yards Company on this matter may be briefly stated. It maintained before the Commission that it was not performing a common-carrier transportation service when it loaded or unloaded live stock at the Chicago stockyards. Had the Commission sustained this contention, the reparation order herein sued on could not have been entered against the Yards Company. It would have been beyond the Commission's jurisdiction. The Commission held, however, that the Yards Company was performing a common-carrier service in loading and unloading the live stock (R. 138, 144), but that the obligation to pay for the service rested upon the line-haul carriers. (R.

144.) Under these findings, the reparation order is still void as to the Yards Company, since the Commission never held that it was not entitled to receive its tariff charges for the loading and unloading service performed by it.

The issue as to who should have loaded and unloaded live stock at the Chicago stockyards really lies between petitioners and the Director General. If the shippers should have done so, they have only discharged their lawful duty by paying the money herein sued for. If the Director General should have done so, he may yet discharge his obligation by payment to the shipper. But in either event, the Yards Company may not be required to reduce its lawful charges for the service.

Notwithstanding these circumstances, we desire to call attention to facts which justify the conclusion that the duty to load and unload live stock rested upon the shipper.

In its first report herein (Pltfs'. Ex. 1, R. 121, *et seq*), after a full and comprehensive discussion of the facts and the law, the Commission decided that the duty of loading and unloading live stock rested upon the shippers and that there could be no recovery by them of any amount paid by them for the service. In its second report (Pltfs'. Ex. 2, R. 141, *et seq.*) this conclusion is reversed, although no new evidence on the point had been introduced.

This reversal was undoubtedly occasioned by the passage of Section 15 (5) of the Act to Regulate Commerce, *supra*, which reads as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of

> outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards."

This amendment to the law became effective February 29, 1920. It is scarcely a reason for the Commission's holding in its second report (Pltfs'. Ex. 2, R. 144) that prior to February 29, 1920, the duty to load and unload live stock did not rest upon the shipper or consignee. On the contrary, the enactment of the law would seem to be a cogent reason for holding that prior to its enactment, the duty to load and unload did rest upon the shipper or consignee. Otherwise it is difficult to understand why there was any necessity for the passage of the law. As was held by the Commission in *Allied Packers* v. *A. T. & S. F. Ry. Co.*, 161 I. C. C. 641, 646, the enactment of this paragraph of the law is traceable to its holding in its first report in this case. The Commission further said at page 646 of its report in that case:

> "The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of live stock to and from public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction. The sense of the paragraph is that the services named

shall be performed at the carriers' expense without additional charge to the shipper."

It was doubtless out of deference to this view of the amendment that the Commission, in this case, sought to impose the expense of loading and unloading upon the Director General. No construction of the law, however, justifies its application prior to the date upon which it became effective. It will be observed that the paragraph makes an exception of other than ordinary live stock and all shipments of live stock other than those to or from public stockyards. The only inference that may be drawn from the language is that the obligation of shippers and consignees of live stock to load or unload the stock under all circumstances was recognized, and the paragraph enacted for the purpose of excepting the shipments therein specified from the application of the uniform rule.

Petitioners refer to no authority sustaining their contention. Their claim is that the final conclusion of the Commission with respect to the obligation to load or unload live stock is an administrative finding supported by evidence, and therefore binding upon the courts. The argument is founded upon a false premise, for it assumes that the finding was based upon a consideration of the line-haul rates and their application. This was not the case, for the line-haul rates for transportation were not in issue and were not considered. Their amount does not even appear in the record. Moreover, the tariffs of the Director General required the shipper or consignee of live stock to load or unload. The applicable provisions of the tariffs are reproduced at page 172 of the certified excerpts from original exhibits filed by petitioners. This requirement was certainly a condition of transportation at the rate in effect. A valid requirement by the Commission that the Director General's ob-

ligations be enlarged must have been preceded by a finding that the line-haul rates were too high if the shipper did the loading or unloading. Yet there is no such finding.

Clearly, the question of the duty to load and unload was one of law only. As stated by the Commission in its second report (R. 144) the facts were not in dispute, and nothing remained but to apply the law to those facts. A court had jurisdiction to do this.

A number of cases are cited in petitioners' brief as holding that the duty to load and unload live stock rests upon the line-haul carriers. With the exception of the decision of this court in *Covington* v. *Keith*, 139 U. S. 129, all the cases cited were actions to recover for loss and damage to shipments and are not in point. In the *Covington Case, supra,* this court did hold (p. 134) that the duty of a carrier to transport live stock includes the duty of furnishing facilities through which a proper delivery can be made (p. 135) and that a carrier cannot make a charge for the furnishing of such facilities, if furnished by itself or on its behalf.

The facts in that case were that an independent stockyards company operated the only unloading facilities which were available to the railroad. Those facilities were made available to the railroad under a contract which, as stated by this court (p. 131), made the stockyards the depot of the railroad for the delivery of live stock handled by it. It further appeared (p. 132) that the railroad had no other facilities through the use of which live stock transported by it could be delivered. This court, therefore, held (p. 136) that since the railroad had not furnished facilities of its own through which live stock could be delivered without additional

charge, the imposition of an additional charge was improper.

The case is distinguishable from the case at bar. In this case the evidence before the Commission established the fact that the line-haul carriers and the Director General had adequate facilities of their own in Chicago through which live stock could be delivered at no charge in addition to the line-haul rate for transportation. The Commission considered this evidence as unimportant, saying in its first report (R. 134):

> "Some testimony was offered as to the facilities of some of the carriers for receipt and delivery of live stock at points on their own rails within the city of Chicago. This has nothing to do with the question here in issue. There is no charge in the complaint that these facilities are not adequate for the receipt and delivery of all live stock which the shippers may desire to load at or consign to such points. A very large proportion, said to be as high as 98 per cent of the stock shipped to Chicago, is consigned to persons at the stockyards."

Petttioners were at all times able to secure a free delivery of live stock consigned to them at the yards operated by each of the line-haul carriers and could thus have avoided the payment of the loading and unloading charges of the Yards Company. To suit their own convenience they elected to take delivery at the yards of the Yards Company. Under these circumstances, the *Covington Case, supra,* imposed no obligation upon the line-haul carriers to make a free delivery at that point. Upon identical facts, the Commission itself distinguished the *Covington Case, supra,* in *Southwestern Horse & Mule Association* v. *A. T. & S. F. R. Co.* 129 I. C. C. 730, 736.

Petitioners' brief (p. 47) clearly shows that at no time did the line-haul carriers or the Director General undertake to load and unload live stock at the Chicago stock-

yards free of charge. As is said in the evidence quoted, the line-haul carriers paid the loading and unloading charges of 25 cents and 50 cents per car because they were compensated in the $2 terminal charge which they received. The terminal charge would have been larger, however, had the loading and unloading charges of the Yards Company exceeded 25 cents and 50 cents per car. In 1917, when those charges were increased to 50 cents and 75 cents a car, the payment of the increase by the line-haul carriers would have been equivalent to a reduction in their rates.

On the entire question of the legal obligation of shippers or consignees to load and unload live stock, the first report of the Commission (R. 130-132) is most complete and enlightening. The practices theretofore uniformly followed by the carriers of the country in connection with the loading and unloading of carload freight are discussed at length. The previous holdings of the Commission and the decisions of the courts are referred to. The decision of this court in the *Covington Case, supra,* is discussed and distinguished. The report of the Commission on this subject is in every way complete and correct and should be upheld. This point was presented to the District Court and the Circuit Court of Appeals as justifying a judgment in favor of the Yards Company, and requires the affirmance of the judgment of the latter court in so far as the Yards Company is concerned. The obligation to pay the charges sued for rested upon the shipper or consignee. Since the shippers have paid them, those charges cannot be recovered. And even if it be held that the obligation to pay them rested upon the Director General, there can still be no recovery from the Yards Company.

V.

CLAIMS FOR REPARATION BEFORE THE INTERSTATE COMMERCE COMMISSION AND SUITS IN COURT MUST BE BROUGHT IN THE NAMES OF THE REAL PARTIES IN INTEREST. WHO MAY MAINTAIN A SUIT IS A MATTER OF LAW. PETITIONERS DO NOT HAVE SUCH AN INTEREST AS ENTITLES THEM TO MAINTAIN THIS SUIT, EITHER IN THEIR OWN BEHALF OR AS FACTORS IN BEHALF OF THE SHIPPERS. THEY NEITHER PAID NOR BORE THE CHARGES SUED FOR AND WERE NOT DAMAGED AND CANNOT RECOVER.

At pages 75 to 96, inclusive, of their brief, petitioners argue that they are the proper parties in interest in this case and have a right to recover, either in their own names and right, or as factors or agents of the shippers. It was upon the ground that petitioners were not the parties in interest that a verdict was directed in the District Court. That was not, however, the ground upon which the decision of the Circuit Court of Appeals was based.

This point was assigned in the petition for certiorari filed herein (p. 18) as one relied upon for the allowance of the writ. This court also permitted the Commission to file a brief supporting the petition for certiorari, in which brief this court was requested to grant the writ in order that it might pass upon the point. And the brief on the merits, filed herein by the Commission as *amicus curiae*, deals only with this matter.

In view of the fact that the writ granted herein is to review the decision of the Circuit Court of Appeals, which did not pass on this point, we have been in some doubt as to the proper course for us to pursue. However, since both petitioners and the Commission have presented the point to this court for determination, we will present our argument thereon.

A.

THIS SUIT IS BROUGHT BY PETITIONERS IN THEIR OWN NAME AND RIGHT.

It is not contended by petitioners in this court that this suit was not brought by them in their own names and right. That this suit was so brought is certain. In paragraph 1 of the petition filed in the District Court it is said (R. 4) that the suit is brought by the plaintiff (petitioners) to recover from the defendants (respondents) certain amounts which plaintiffs allege were illegally collected by defendants for the service of loading and unloading live stock at the stockyards in Chicago. In paragraph 2 (R. 4) each petitioner is named as

> "being entitled to receive from the defendants hereinafter named the amounts respectively set forth in said order of the Commission."

In paragraph 6 (R. 11), it is said:

> "That this is a civil suit for damages by the plaintiffs against defendants for a violation of the Act of Congress known as the Act to Regulate Commerce."

In paragraph 22 (R. 18), it is alleged that the order of the Commission directed,—

> "the said defendants therein, and who are named herein, to pay the aforesaid damages to plaintiffs."

In the same paragraph it is alleged that,—

> "by reason of the premises, the defendants have become and are indebted to the plaintiffs."

These allegations of the petition need no construction. It cannot be doubted that the petition is a demand by petitioners, in their own names, for a judgment requiring respondents to pay to them in their own names, the sum sued for. Nowhere in the petition is there any allegation that petitioners were acting for anyone else or

that respondents are indebted to anybody except petitioners. This view was also held by counsel for petitioners when the matter was pending in the District Court. In their reasons assigned in support of the motion to vacate the judgment, counsel for petitioners say (R. 316) that it became apparent to them that the trial court directed a verdict in favor of the defendants,—

> "on the ground that plaintiffs had filed said petition in the above entitled cause in their individual capacities."

Recognizing that this was true, counsel prayed leave to amend and stated to the court (R. 317) that they,—

> "came to the conclusion that by a proper amendment to the petition filed in the above entitled cause, changing the capacity in which plaintiffs bring this suit, the cause of action set forth in the petition herein may be properly maintained."

Also, in their motion to amend the petition, petitioners said (R. 100) that:

> "Your petitioners brought this suit in their individual names as plaintiffs. * * *"

With respect to this matter the District Court said in its opinion, referring to petitioners (R. 66):

> "The action is brought in their individual names. It is not and does not purport to be brought in any representative capacity. The plaintiffs do not sue as assignees as was done in the case of *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117."

The Circuit Court of Appeals also said (R. 394):

> "The action does not purport to be brought by appellants otherwise than in their respective individual capacities. Indeed, with attention directly challenged to their right to sue, it was contended by their counsel that they had such right, and while most likely the shippers would have the benefit of any recovery, this was wholly within appellant's volition."

And in their brief filed in this court, it is said (p. 2):

> "Petitioners brought suit as plaintiffs in the District Court * * *."

In taking the position in court that they were entitled to recover in their own names and right, petitioners were consistent, for they took the same position before the Commission. They have never claimed a right of action by virtue of assignments, as was the case in *Spiller* v. *A. T. & S. F. Ry. Co.* 253 U. S. 117. Nor have they ever claimed a right to recover upon powers of attorney. It was testified that the Chicago Live Stock Exchange had powers of attorney from shippers upon all shipments (Defts.' Ex. 8, p. 160; R. 269), but the attitude of the Exchange with respect to such powers of attorney was reflected in the statement made by its counsel when interrogated with respect to them. He said (Defts.' Ex. 9, pp. 316, 317; R. 270):

> "No, they are not in the record and they are not going to be put in. We are not relying on them at all. They are just so much waste paper as far as this case is concerned."

Even had the powers of attorney been put in evidence and relied upon, they would not have been sufficient to support a proceeding in the name of petitioners or of the attorney named therein. Their only effect would have been to authorize the attorney to bring the proceeding in the name of his principal.

The attitude of petitioners is further reflected by other parts of the record made before the Commission, those parts being quoted by the trial court in its memorandum opinion of July 31, 1930. (R. 114, 115.) On these hearings it was definitely said by counsel for petitioners that the theory of the proceedings before the Commission was that petitioners had the legal right to collect the

money without disclosing what they did with it thereafter, and that having collected it they had the right to retain it (Defts.' Ex. 9, p. 236); that legally, petitioners had the right to collect the money and keep it, if they wanted to (Defts.' Ex. 9, p. 563).

The Commission said in its report of June 2, 1925 (Pltfs.' Ex. 3, R. 151) that petitioners,—

> "seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers, and also as factors and agents for and on behalf of the live-stock shippers who were the consignors."

Petitioners are then found to have been damaged, and entitled to reparation, as factors and agents. (R. 151, 152.) The order of December 12, 1927 (Pltfs.' Ex. 4, R. 157 *et seq.*) does not, however, award the reparation sued for herein, to petitioners as factors and agents for anybody. The finding of that order (R. 158) is that petitioners are entitled to the award, and after specifying the amounts due each petitioner, respondents are ordered to pay those amounts to petitioners (R. 208). The shippers are not mentioned in the order, nor is the alleged factorship of petitioners. The award of the Commission, therefore, was not to petitioners as factors for the shippers, but to them in their own right. Petitioners also take this position, for their brief in this court (p. 2) states that,—

> "the order of the Commission is premised on the exaction from the plaintiffs in this suit * * * of an additional charge of 25 cents per car for unloading live stock * * *."

It is thus plain that petitioners have at all times claimed a right of recovery in their own names and right; that the award of the Commission was to them and that this suit was brought on that theory. It is equally plain that if they do not have that right, they cannot recover.

B.

ALL CLAIMS MUST BE PROSECUTED IN THE NAME OF THE REAL PARTY IN INTEREST.

It is elementary that any claim in any form must be prosecuted in the name of the real party in interest and that the question of who may maintain any action is a matter of law and cannot be determined by agreement between the parties. In *Mackay* v. *Randolph Macon Coal Co.* 178 Fed. 881-884, (C. C. A. 8th Ct.) the question was whether the trustee of a mortgage or the bondholders were the proper parties to sue to recover a deficiency after exhausting the mortgaged property by foreclosure. In deciding the case, the court said at page 884:

> "In the present case the trustee under the mortgage is neither the holder nor the payee of the bonds. It clearly could not have maintained an action at law for their collection. We are aware that the fifteenth article of the mortgage authorizes the trustee to collect and recover the principal and interest of the bonds for the owners and holders thereof. This may have reference to their collection by the enforcement of the security. If that is not its meaning, we are of the opinion that it could not confer upon the trustee the right to maintain an independent action upon the bonds. Who may maintain a suit is a matter of law, not subject to be controlled by the private convention of parties. *Hybart* v. *Parker,* 4 C. B. (N. W. 209); *Evans* v. *Hooper,* 1 Q. B. Div. 45; *Gray* v. *Pearson,* L. R. 5 C. P. 568; *Knorr* v. *Bates,* 14 Misc. Rep. 507, 35 N. Y. Supp. 1060. Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest."

The cases cited in the opinion support the rule announced. In *Fitkin* v. *Century Oil Co.* 16 Fed. (2d) 22-24, (C. C. A. 2nd Circuit), the facts were similar to those in

Mackey v. *Randolph Macon Coal Co., supra.* There the court said:

> "Under the mortgage here considered, since the trustee is neither the holder nor the payee of the note, it could not maintain an action at law for the collection of any of the notes. Its authority to proceed under the mortgage to collect the principal and interest of the bonds has reference to the collection of or the enforcement of the security.
>
> The right to maintain a suit is a matter of law, and not subject to be controlled by private conventions of the parties. Suits must be in the name of the real parties in interest."

We know of no cases asserting a contrary rule. In *Spiller* v. *Atchison, Topeka & Santa Fe Railway Company,* 253 U. S. 117, the plaintiff sued on written assignments which had been executed by each shipper and was, therefore, the holder of the legal title to the claim.

It is true that after the Commission has found that a rate or practice is unlawful, any person damaged by reason thereof may sue to recover, even though not a party to the proceedings before the Commission. This was what was done in *Phillips Company* v. *Grand Trunk Western Railway Company,* 236 U. S. 663. But that case does not hold that a volunteer may sue in court on a claim, the title to which is in another party not before the court. No case so holds.

C.

PETITIONERS HAVE NO INTEREST IN FACT IN THE CHARGES HEREIN SUED FOR.

The facts with respect to what actually happened in connection with the payment of the loading and unloading charges of the Yards Company are not in dispute. Nor

is there any question as to the relationship which existed between petitioners and the shippers of the live stock. Petitioners were commission merchants as to all shipments in controversy. They received the shipments as such, sold the live stock, deducted from the proceeds all charges, including freight, yardage, commissions, and the unloading charge complained of, and remitted the balance to the shippers, usually before the Yards Company made collection from the commission men. The Yards Company collected the charges from the commission men twice a week, but the commission men remitted the net proceeds of the sales usually on the day of the sale, holding out the amount necessary to pay all charges, including their own.

D. C. Mosier, vice president of the Live Stock Exchange and chairman of its Transportation Committee, a commission man, member of one of petitioners, testified (Defts.'-Ex. 8, certified to this court, pp. 30 and 31):

> "When this stock is received at the yards by the commission men, they pay all the charges, the yardage charges, the freight terminal charges and remit to the shipper the net proceeds of the consignment. * * * The relationship between the farmer, producer or shipper, whichever you may call him, is very close. We transact his entire business. We not only sell his live stock and take a commission, but we are his agent in every respect; in the payment of his freight, in the filing of claims, both for undercharges and for damages in transit and it is our duty to look after his interests in every way."

Mr. Mosier also testified (Defts.' Ex. 8, p. 32):

> "Q. How are the financial relations between the commission man and the farmer carried in due course of business? Are they carried in open accounts; that is, do you carry a running account with each farmer?
>
> A. There are some accounts kept that way. In most cases or a good many cases, the shipper is re-

mitted for the net proceeds and that closes the account."

Mr. Mosier further testified (Defts.' Ex. 8, pp. 36 and 37):

"The position of the Chicago Live Stock Exchange and its individual members representing their customers, who are the shippers and producers of live stock, is that they are entitled—to this reparation—and that is why the proceedings were started, and when it is collected, if it is allowed, the shipper and producer will get every cent. Not one dime, not one nickel, will be taken by the Chicago Live Stock Exchange or any of its members for the collection of this amount."

Mr. Mosier further testified that he was a member of the firm of Rosenbaum Bros. Co., one of the petitioners, and (Defts.' Ex. 8, pp. 48 and 49):

"Q. As an individual and as a member of the firm of Rosenbaum & Co., do you claim any reparation in this matter?

A. We claim this reparation for our shipper as his agent.

Q. You say 'we.' To whom do you refer by 'we'?

A. To Rosenbaum Bros."

H. R. Park, traffic manager of the Exchange, testified (Defts.' Ex. 8, p. 98):

"The commission man places upon the waybill stub the correct weight and the waybill is then returned to the joint agent, who conducts some further clerical work in connection with the waybill, and it is then turned over by him to the Union Stock Yards & Transit Company, who submits to the commission merchant *twice a week*, statement of all the charges due from that commission merchant, the commission firm paying to the Union Stock Yards & Transit Company said freight charges, which in the cases involved in this hearing, included the unloading charge of 25c per car."

E. N. Cruse, secretary and treasurer of National Live

Stock Commission Company, a petitioner, testified (Defts.' Ex. 9, certified to this court, pp. 62-64):

"Q. When you paid that freight bill, what did you do with that twenty-five cents? Did you charge it against Eiler?

A. Charged it to the shipper. * * *

Q. And you have been reimbursed.

A. Yes, sir.

Q. So, as a matter of fact, your firm has not any claim at all against anybody for this unloading charge on its own account, have they?

A. As the agent of the shipper.

Q. Now, as representative of yourself, have you any claim?

A. No sir."

L. F. Weeks of Bowles Live Stock Commission Company, a petitioner, testified (Defts.' Ex. 9, p. 194):

"Q. Are these extra charges paid by your company on behalf of the shippers of live stock which you represent?

A. Yes, sir."

Wm. S. Burmeister, office manager of Martin Bros. & Co., a petitioner, testified (Defts.' Ex. 9, pp. 207, 209):

"Q. Were these charges paid by you on behalf of the shippers of live stock to you?

A. Yes, sir.

Q. And were they paid under the conditions of the relationship described in the testimony of Witnesses Mosier and Park?

A. Yes, sir."

Ralph Kennedy, office manager of Wood Brothers, a petitioner, testified (Defts.' Ex. 9, p. 230):

"Q. On whose behalf did you pay these charges?

A. On behalf of the owners of the live stock consigned to us.

Q. When you recover any amount of reparation in this case, what disposition will you make of the money?

A. It will be returned to the proper owners from whom it was collected.

Q. And those proper owners are the parties shown as the consignors?

A. As the consignors."

Fred D. Gillogly, of the firm of Gillogly & Co., a petitioner, testified (Defts.' Ex. 9, pp. 271 and 272):

"Q. Did the firm which you represent, to your knowledge, pay the extra charge for loading and unloading live stock on every shipment consigned to them at the Union Stock Yards while the extra charge was in effect?

A. Yes, sir.

Q. For whom did you pay these charges?

A. Paid them for the owner and consignor.

Q. The owners and consignors of the live stock?

A. Yes."

He further testified (Defts.' Ex. 9, p. 277):

"Q. On shipments that came into the yard on which this charge has been paid by your company, that charge as paid was subsequently passed on by you to the owner of the stock, was it not?

Mr. Hillyer: Do you know what he means by passed on?

A. Yes.

Q. (By Mr. Towner.) I mean by that you subsequently collected the amount that you paid here for loading and unloading from the owner of the stock, is that correct?

A. *Well, we deduct all charges before we pay the principal anything.*"

Chas. A. Wilson of W. W. Wilson & Co., a petitioner, testified (Defts.' Ex. 9, pp. 363, 364):

"Q. In every case where you paid this charge you collected the amount from the owner of the stock, didn't you?

A. Yes. * * *

Q. You got the 25 cents, though, from the shipper?

A. We paid that with *his own* money, not with *our* money."

Mr. Seth B. St. John of Brown-St. John Co., a peti-

tioner, testified (Defts.' Ex. 11, certified to this court, p. 953):

"Q. In every instance where you paid the unloading charge you collected that amount back from the shipper, didn't you?

A. Yes, sir.

Q. And, as the matter now stands, your firm isn't out of pocket any money by reason of the payment of these unloading charges?

A. *We are just simply deducting* the total amount of the expense of the shipment and *depositing to their credit the net amounts* after all of this expense is taken out."

The foregoing testimony is typical. It is said at page 81 of petitioners' brief, that the charges in question were paid by petitioners "out of their own funds", but this is incorrect. They may have been paid by petitioners' checks, but those checks were payable out of funds belonging to the shippers and derived from the sale of the live stock. The undoubted facts are that a substantial part of the charges herein sued for was paid by petitioners with money belonging to the shippers of the live stock and then in the hands of petitioners as commission men; that seldom did petitioners have any of their own money tied up in these charges; that in cases where they may have paid the charges prior to the sale of the stock, they promptly reimbursed themselves from the proceeds of the sale when made, and that while petitioners were doubtless the agents of the shippers for the purpose of receiving and selling the stock and remitting the net proceeds, that agency terminated and the account was closed when those proceeds were remitted to the shipper.

Notwithstanding these facts, petitioners insist that they are entitled to recover in their own names and for their own benefit. They acknowledge no obligation to account to anybody for any amounts recovered, although

some witnesses did announce their intention of passing any recovery on to the shippers. If there is a recovery by petitioners and there is no voluntary payment by them to the shippers, it is certain that the parties who actually paid the charges sued for will not be reimbursed. It is equally certain that petitioners, who have lost nothing by virtue of the payments in question, will profit to the exact extent of any recovery herein.

D.

PETITIONERS WERE NOT DAMAGED BY THE COLLECTION OF THE CHARGES SUED FOR AND CANNOT RECOVER IN THIS CASE. THEY ARE NOT THE PARTIES IN INTEREST.

As we have pointed out, this suit was brought by petitioners in their own name and right. As also appears from the Commission's reports and orders, the award by that body was to petitioners in their own name. In making the award in this case, the Commission followed its prior holding in the case of *Missouri Portland Cement Company* v. *Director General,* 88 I. C. C. 492. In that case the consignor of the shipments involved was given reparation by a majority of the Commission although it had recovered the charges complained of from the consignee after having originally paid them. This decision of the Commission, as pointed out at page 493 of its report, reversed its previous practice of awarding reparation only to parties who not only paid but bore the charges attacked. The two theories of the Commission are dealt with in the opinion of the lower court (R. 68, 69) and as there stated, the holdings of the Commission prior to the *Missouri Portland Cement Case, supra,* were reversed because of the construction placed by the Commission upon the decision of this court in *Southern Pacific Co.* v. *Darnell-Taenzer Co.* 245 U. S. 531.

The *Darnell-Taenzer* case arose out of the decision of the Commission in *Burgess, et al.* v. *Transcontinental Freight Bureau,* 13 I. C. C. 668, wherein the Commission found that the rate charged on hardwood lumber from eastern points of production to the Pacific Coast had been unreasonable and awarded reparation. Complainants were the consignors of the lumber and it appeared that they had sold f. o. b. destination. The consignees paid the freight charges on delivery and deducted those charges in making settlement with the shipper for the lumber. The Commission held that although the consignees had physically paid the charges, that is, as the Commission said "taken the first step," they having deducted the same in making settlement with the shippers, the shippers (consignors) had actually borne the freight charges as such and were entitled to the award of reparation. Thus, in that case, the shippers who were the complainants, were in the same position as the shippers here, and the consignees were in the same position as petitioners here.

The defendants refused to pay the award on the ground that although the complainants (consignors) had actually paid and borne the freight charges as such, they had not been injured inasmuch as they had passed those charges on to the consumer in the price for their lumber. Suit was brought in the Circuit Court to enforce the award. A demurrer to the declaration was sustained (190 Fed. 659). On appeal, the Circuit Court of Appeals reversed the judgment of the trial court (221 Fed. 890) and remanded the case for a new trial.

In reply to the carriers' contention that the consumer alone was damaged by the payment of the excessive freight charges, the Court of Appeals quoted the fol-

lowing from the opinion of the Commission in *Nicola, etc.* v. *L. & N. Ry. Co.* 14 I. C. C. 199, 208:

> "The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation."

The court also quoted from what the Commission said in its first report in the *Burgess Case*, 13 I. C. C. 680:

> "If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

Upon a new trial in the District Court the jury was instructed that if it found the rate charged unreasonable and that prescribed by the Interstate Commerce Commission reasonable, it should find for the plaintiffs, in accordance with the Commission's award. The jury found for the plaintiffs and this judgment was affirmed by the Circuit Court of Appeals at 229 Fed. 1022. Upon appeal to this court, the judgment was affirmed, thus upholding the decision of the Commission that although the consignee may have physically paid the freight charges, yet if he deducts those charges in settlement with the consignor, the consignor is the person who actually bears the charges and is the party injured and is entitled to the award of reparation.

The effect of the decision of this court in the *Darnell-Taenzer Case, supra*, is well stated by the District Court in the case at bar, where it is said (R. 71):

> "As this court interprets the *Darnell-Taenzer case*, it simply holds that the court, in a suit on a reparation award, will not inquire into the commercial effect of the payment of an illegal freight rate. What the court refers to, in the *Darnell-Taenzer case*, is the economic incidence of the payment of the excessive charge. Who, in an economic sense, ultimately bears the payment is a matter into which the court will not inquire. The economic bearer of the burden, be he purchaser or consumer, is not a proper party plaintiff. Neither can the defendant absolve itself from the payment of damages because, in an economic sense, the plaintiff might add the excess price to his product and itself impose the burden or injury upon the consumer."

We submit that the Commission erred in considering the decision in the *Darnell-Taenzer Case, supra*, as an authority for departing from its previous practice of awarding reparation only to those parties who had borne the charges condemned, and that the decision of the

Commission in the *Missouri-Portland Cement Case, supra,* was due to a misapprehension of what this court had decided.

The case of *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.* 269 U. S. 217, is also directly in point. In that case the plaintiff was the consignor of the shipments on which it was awarded reparation. The shipments were sold at a delivered price *f. o. b. destination.* The purchaser (consignee) paid the freight bill upon delivery of the shipments and remitted to the plaintiff the amount of the purchase price, less the freight charges.

The Commission, at 60 I. C. C. 595, awarded reparation to the Sloss-Sheffield Company, the shipper, although the freight charges had been physically paid by the consignee, for the reason, as stated by the Commission, that the shipper had actually paid and borne the charges. Suit was brought to enforce the award. When the case was considered in the Circuit Court of Appeals (295 Fed. 57), that court said at page 58:

> "The freight charge cannot well be regarded as paid or borne by a consignee when the payment is made with money to which the consignor is entitled; and in pursuance of a contract obligation of the consignee to the consignor. As the freight was paid by the consignor's debtor, who thereby, pursuant to contract, reduced his debt by the amount of the freight, such payment is to be considered as originally made by the consignor."

The case finally reached this court. In deciding it, this court said at pages 234 and 235 of its decision:

> "It is claimed that the Sloss-Sheffield Company cannot recover because it was not damaged by the excessive freight charges."

At page 235 it was also said:

> "The Commission and the District Court found that the Sloss-Sheffield Company bore the transportation charges and was damaged to the extent of the

difference between the charges paid and those that would have accrued at the rates found reasonable. Both tribunals found further that all the iron was sold f. o. b. destination; that it was shipped to purchasers named as consignees on straight bills of lading; that it was invoiced and charged on the seller's books at the full delivered price; that, pursuant to arrangement between seller and purchaser, the consignee physically paid the freight upon acceptance of the delivery; and that he was credited with this at the rate specified in the sales contract as a part payment of the purchase price, and remitted only the balance of the purchase price."

And again on page 235 it was said:

"It was likewise settled by *Southern Pacific* v. *Darnell-Taenzer Lumber Co.* (See *Darnell-Taenzer Lumber Co.* v. *Southern Pacific Co.*). (See 190 F. 659; 221 F. 890), that where goods are sold f. o. b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who *consequently is entitled to sue.* (Italics ours.)

In this connection, attention is called to the footnote on page 236 of this court's opinion in which reference is made to a large number of decisions by the Commission, in all of which it had held that the person actually bearing the freight charges was the party entitled to the award of reparation. In that note no reference whatever is made to the Commission's opinion in the *Missouri-Portland Cement Case, supra.*

In *Illinois Central R. Co.* v. *Vest, et al.* 39 Fed. (2d) 658, on plaintiff's motion for a temporary injunction against enforcement of an order of the Railroad Commission of Kentucky, the court said at page 660:

"The rule is that, where a shipper pays a rate held to be unreasonable, he may recover the excess and need only show that he paid and bore the charges, and neither the Commission nor the court will inquire whether, in the course of his business, he recouped his losses or passed them on to others. This was held in *Southern Pacific Co.* v. *Darnell Lumber*

Co. 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, and reaffirmed in *L. & N. R. Co.* v. *Sloss-Sheffield Co.* 269 U. S. 217, 46 S. Ct. 73, 70 L. Ed. 242. The questions of counsel for the railroad company to which objections were sustained dealt with the subject of passing the charges on to others, which, under these authorities, was not open."

We submit that these cases dispose of the car at bar. Petitioners are in precisely the same position as were the consignees in the *Darnell-Taenzer* and *Sloss-Sheffield Cases, supra.* They paid the charges herein sued for with the shipper's money and for his account. They have no investment in those charges and were never damaged by their payment. If anyone had a right to recover those charges, it was the shippers, whose money paid them. The shippers here are in precisely the same position as the shippers in the two cases cited and who were permitted to recover.

The doctrine of the *Missouri Portland Cement Case, supra,* the authority upon which the award in this case was made, has never received the sanction of the full Commission. Even in its report of June 2, 1925, in this case (Pltfs.' Ex. 3, R. 147), four Commissioners joined in the award only as constrained to by the decision of the majority in the *Missouri Portland Cement Case* (R. 156). While the Commission has since followed the doctrine of that case, there has always been a substantial minority in opposition thereto. As late as November 4, 1930, in the case of *General, etc. Corp.* v. *Southern Ry.* 169 I. C. C. 83, four of the eleven Commissioners dissented from a majority award of reparation based upon the doctrine of the *Missouri Portland Cement Case, supra,* and one concurred only because of the desirability of consistency in the Commission's reports. Moreover, in that case, as pointed out by the Commission (p. 84), the complainant

"paid the freight charges out of its own money and, therefore, has a legal interest in the proceedings."

And even under the theory of the Commission and petitioners, there can be no recovery in this case. In both the *Darnell-Taenzer Case* and the *Sloss-Sheffield Case*, the Commission found that the rates assailed were unreasonable; that is, that they violated Section 1 of the Act to Regulate Commerce. This was also true in the *Missouri Portland Cement Case, supra.* With respect to this fact, this court held, in its decision in the *Sloss-Sheffield Case, supra* (p. 235), that under the *Darnell-Taenzer Case, supra,*

> "a recovery for excessive charges can be had under Section 1 (of the Act to Regulate Commerce) without specific proof of pecuniary loss . . . ."

In the case at bar, however, there is no award of reparation on the ground of any violation of Section 1 of the Act. There is no finding that the charges of either respondent were unreasonable. On the contrary, the reasonableness of the charges of the Yards Company was not attacked (R. 135), and the Commission said it was not necessary to pass on the question. (R. 145.)

There is nothing new in the theory that the person damaged by an act is the person entitled to a recovery. Section 8 of the Act to Regulate Commerce (U. S. C. A., Title 49, Sec. 1 to 15a, pp. 316, 317) so provides in the case of a violation of that Act by a common carrier. In *Parsons* v. *C. & N. W. Ry. Co.* 167 U. S. 447, the action was brought to recover damages on account of alleged violations of the Interstate Commerce Act. This court said at page 460:

> "The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act.' So before any party can recover under this Act, he must show not only the wrong of the carrier, but that that wrong

> has in fact operated to his injury. We think . . . the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act."

In *Knudson, etc. Co.* v. *Michigan Central R. Co.* 148 Fed. 968, the action was to recover damages under Section 8 of the Act. The court said at page 974:

> "To support a recovery under this section, there must be a showing of some specific pecuniary injury."

This suit is to recover compensation for an injury alleged to have been done. The Commission itself has held that proceedings before it to recover reparation are proceedings to recover damages for an injury. *Southern Pine Lumber Co.* v. *Southern R. Co.* 14 I. C. C. 195, 197. In *Pennsylvania R. Co.* v. *International Coal Company*, 230 U. S. 184, it is said at page 200, referring to the Act:

> "On the civil side, the act provided for compensation, not punishment."

In *Spiller* v. *A. T. & S. F. Ry. Co., et al.* 253 U. S. 117, this court said at page 135:

> "A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty, but for compensation."

See also *Davis* v. *Portland Seed Co.* 254 U. S. 403, 418. The payment of compensation infers a previous damage or improper payment. Yet in this case, petitioners sustained no such damage and made no such payment.

The cases cited in petitioners' brief (pp. 78-86) and relating to suits by and against carriers for loss, damage or overcharge, have no application here. This suit is brought under the provisions of the Act to Regulate Commerce, not upon any common-law right. It was brought before the Commission under Section 9 of the Act, the right of action being one provided for by Sec-

tion 8. Section 8 specifically provides that the liability of a carrier for doing anything prohibited by the Act shall be "to the person or persons injured thereby." This limitation fixes the rights of petitioners.

Petitioners also cite *Consolidated Cut Stone Co.* v. *A. T. & S. F. Ry.* 39 Fed. (2d) 661. In that case, the suit was brought by the consignee, the buyer, upon a finding by the Commission that the rates charged on the shipment involved were unreasonable. The suit was defended on the ground that while the consignee had paid the charges, he collected the amount of them from the shipper, and was, therefor, not damaged. The District Court, however, held that under the facts, the consignee both paid and ultimately bore the charges. It was pointed out (p. 662) that the consignor acknowledged that under the contract of sale, the consignee was entitled to any reduction in freight charges. The court also said at page 662:

> "In the *Sloss-Sheffield Case, supra,* it was held that 'the purchaser who paid the freight did so solely as agent for the seller.' The goods were sold f. o. b. destination. No so in the case here, as the stone was sold f. o. b. quarries. In the case at bar the consignor routed the stone as directed by the plaintiff, and acted as its agent therein. Title to the stone passed to consignee when loaded on the cars at the quarries and was billed to consignee."

Judgment therefor went for plaintiff, and was affirmed on appeal (47 Fed. (2nd) 226), the Circuit Court of Appeals agreeing with the District Court that under the facts, the consignee (plaintiff) actually paid and bore the charges sued for. A petition for certiorari in the case was denied by this court at 283 U. S. 843. The case does not hold contrary to our view. In fact, it supports our argument, since judgment went for the plaintiff, not because it paid the charges, but because it was the party

actually damaged by the payment. It is because petitioners were not damaged by the payment of the amounts sued for herein that they should not be permitted to recover.

From the foregoing it is quite obvious that petitioners are not entitled to recover the reparation here sued for in their own name and right. Not only would such a recovery be contrary to the law, but it would be contrary to reason and justice, even if we assume an improper collection, which we deny. If petitioners are entitled to a recovery in their own name and right, what then becomes of the rights of the shipper, who, according to all of the evidence in the record, is the man who actually paid the charges? It is true, as we have pointed out, that there were some statements made on the record of the intention of petitioners to pass any collection on to the shipper, but any legal obligation to do so was denied. Certainly a voluntary statement of intention on the part of individual petitioners cannot be given the legal effect of conferring upon them any right to prosecute this action in their own name.

Common justice would seem to bar any rights of petitioners in this case. They are out nothing. If they fail to recover, they are in no worse financial condition. They have been deprived of nothing by the collection of the charges sought to be recovered. It follows that if they are permitted to recover, this action will be a source of profit to them. They will have acquired money which they never had before. A damage done them by respondents will not have been repaired, since they have never sustained such a damage, but they will have something for which they gave nothing. It will rest with them to decide whether or not they will pay the amount of any recovery to the shippers who actually disbursed the

money sued for herein, assuming that those shippers are still alive to receive it.

As stated by the trial court in its opinion herein (R. 77), petitioners are volunteers who have undertaken to do something for the shippers, and by virtue of this undertaking, seek to impose a legal obligation upon respondents, while at the same time denying any resulting legal obligation to report back to the parties on whose behalf they claim to be acting.

We submit that the Commission erred in its decision in the *Missouri Portland Cement Case, supra,* and cases following that case. It has misconstrued and misapplied the decision of this court in the *Darnell-Taenzer Case, supra.* That this is so, is sufficiently proved by the undisputed fact that petitioners would profit, if permitted a recovery in this case, while the shippers who paid the money sued for are left without remedy. It is to be assumed that even the Commission had some misgivings on the subject for in its second report (Pltfs.' Ex. 2; R. 146) it found that the *shippers* had been damaged and were entitled to recover. Petitioners alleged rights were not referred to until the Commission made its third decision. (Pltfs.' Ex. 3; R. 147 *et seq.*)

The Commission has filed a brief herein as *amicus curiae* which deals entirely with this question. It has presented the same arguments as petitioners and supported them by the same cases. Much weight is attached to the decision of this court in *N. Y. C. R. Co.* v. *York, etc. Co.,* 256 U. S. 406, although it has no relation to the issue. This court there upheld an implied contractual obligation. We are here concerned with an attempt to make a recovery through a statutory proceeding, brought under a statute which prescribes the conditions under which there may be such a recovery. The

Commission's brief also errs in fact by assuming that any recovery by petitioners would accrue to the shippers and that the Commission so intended. The fact is that the Commission made no such limitation in the order sued on herein, and that petitioners have expressly denied any obligation to pass any recovery on to the shippers who actually paid the money. Nor do petitioners assert any right of the shippers in this court. They are here claiming a recovery for their own benefit.

At page 16 of its brief, the Commission refers to the alleged impracticability of a recovery by the shippers in their own name. Whether or not this is so is unimportant, for the convenience of the Commission and the shippers cannot be made the measure of respondents' rights and liabilities. *Kansas City Southern R. Co.* v. *United States,* 252 U. S. 178, 187, 188; *Interstate Commerce Commission* v. *Stickney, supra.*

The Commission also errs in fact (pp. 23, 24, Commission's brief) in assuming that the charges herein sued for were not paid with the shippers' money. The record shows that they were. Nor is this fact unimportant, for how could petitioners possibly be injured if they never spent any of their money in paying the charges? Nor has this court ever held that a party paying charges has been damaged by that fact alone (p. 30, Commission's brief). In both the *Darnell-Taenzer Case, supra,* and the *Sloss-Sheffield Case, supra,* the successful party had not only paid the charges, but had actually borne them. In neither case had the plaintiff been able to recover the charges, as such, from someone else. Something more is required than that a plaintiff should be a party to the transportation contract and that he should have paid the charges and be liable for undercharges. In addition, he must have been really damaged by the payment.

The Commission's brief reduces to the statement on page 35 thereof, that a consignee who has physically paid charges may recover them even if not damaged, if the shipper who has actually been damaged by the payment makes no objection. This is stated to be the rule now followed by the Commission. It is a convenient method of always requiring a defendant to pay reparation, but is an obviously incorrect application of the statute under which such recoveries are sought. A failure of a damaged party to claim a recovery confers no rights upon a party who has not been damaged. It does not, in itself, constitute a transference of the right to sue. The party who has suffered the damage still remains as the only party who may recover compensation for that damage.

This case is a good illustration of the manner in which the Commission's theory works. Because the shippers, who actually sustained the alleged damage have not objected, the Commission has granted a recovery to petitioners, who were not damaged in any way. It has given petitioners a right of recovery which, if sustained, will give them something they have never had; which will compensate them for an injury and loss they have never sustained. Such an application of the law merits and should receive condemnation. We submit that since the Act to Regulate Commerce limits such a recovery as is here sought to parties that have sustained damage, and since petitioners have not been damaged, the order of the Commission awarding reparation to them is invalid and no recovery can be made thereon.

E.

PETITIONERS CANNOT RECOVER IN THIS CASE AS FACTORS OR AGENTS FOR THE SHIPPERS.

As an alternative to their claimed right to collect in their own names, petitioners urge (pp. 87-96, petitioners' brief) their right to collect as factors or agents for the shippers. Whether or not they took this position before the Commission is somewhat uncertain, as at some times the counsel then representing them insisted upon their right to recover in their own right, and at other times insisted upon their right to recover as factors for the shippers. The order sued on, however, awards reparation to petitioners in their own name and right, and, certainly, this suit was not brought by petitioners as factors or agents for anybody. For this reason petitioners cannot recover in this case as factors and agents for the shippers, and what their rights might be in an action brought as factors or agents is of no importance. Nevertheless, the opinion of the District Court deals with the right of petitioners to recover as factors or agents (R. 73 *et seq.*) and correctly disposes of the question.

Petitioners cite the familiar rule that a commission merchant or factor entrusted with the custody of property for sale has a special interest in the property, and if it is damaged while in his possession, he can sue the wrongdoer in his own name and recover; or having sold the property and having a special interest in the proceeds of the sale, may sue in his own name to recover the same. We have no quarrel with this contention, but say the doctrine invoked has no application here. It does not apply after the transaction has been ended and after the relation has terminated, as was true in the

case of each shipment involved in this suit. The doctrine is based upon the interest of the factor, and when that interest ceases to exist, his rights to sue also cease to exist. Petitioners cite no authority which does not show an existing interest of the factor either in the property or in the proceeds of the sale.

Hamilton v. *Dillon,* 11 Fed. Cas. 332 (p. 89, petitioners' brief) was decided in 1871. Petitioners' brief correctly quotes part of the judge's charge to the jury. As a preliminary to this declaration of law, the court also said (p. 334):

> "I regret that the briefness of the time intervening between the trial of the case and my enforced departure to Memphis to open the courts there at the appointed time for the Western district, has precluded a more elaborate consideration than I have been able to bestow upon the points discussed by the counsel upon both sides, and I would hardly be willing now to act in the premises if I were not satisfied that, whatever the result may be here, the unsuccessful party will renew the contest in the supreme court of the nation, a legally infallible tribunal, upon which, therefore, will be devolved the responsibility of disposing of the case."

The judgment of the lower court for defendant was affirmed in this court (88 U. S. 73) but without any statement of plaintiffs' rights as factors.

In *Smith & Son* v. *Blohm,* 159 Iowa 592 (141 N. W. 32), cited by counsel (p. 90, petitioners' brief), the plaintiffs were commission men at Omaha Stock Yards. They had received a consignment of sheep for sale as such commission men. They sold the sheep in their own name to the defendant Blohm and remitted the net proceeds on the basis of the sale to the shipper. Blohm repudiated the contract and the commission men who had sold to him in their own names and had remitted the net proceeds on the basis of the sale to the shipper, were per-

mitted to recover. They had an interest in the proceeds of the sale to the extent of the full amount thereof, having remitted to the shipper.

In *Progress Blue Ribbon Farms* v. *Chicago Horse Sales Co.* 153 Wis. 249 (140 N. W. 1132), cited by counsel (p. 90, petitioners' brief), a like situation existed. The Chicago Horse Sales Co. had sold for W. P. Dickinson and others certain stock and had accepted from the purchaser a draft in payment. The Sales Company remitted the net proceeds to Dickinson. The draft was on one Dunbar payable at a Milwaukee bank. Before the draft was presented, Dunbar was garnished by Progress Blue Ribbon Farms as a supposed debtor of Dickinson. The question presented was whether the money payable on the draft was the property of the Sales Company or of Dickinson. If of Dickinson, it was subject to garnishment. If of the Sales Company, it was not. In holding it was the property of the Sales Company, the court said:

> "The general rule is that a person employed to sell another's property at auction, or a factor to whom property has been assigned for sale, has an interest, upon a sale being made, in the proceeds, entitling him to sue and recover the same in his own name and, in case of his paying the net proceeds and delivering the property before receiving payment from the buyer, as in this case, and the principal accepts and retains the money the agent is entitled to recover of such buyer for his own use."

Undoubtedly the decisions in the *Blohm* and *Blue Ribbon* cases state the rule as applicable to the facts therein. In the case of *Beardsley et al.* v. *Schmidt, et al.* 120 Wis. 405 (98 N. W. 235) cited by counsel (p. 91, petitioners' brief), the rule is, we think, also announced. The court in that case said:

> "This implied authority of the factor to sell in his own name and to maintain an action in his own name to recover the purchase price grows out of the

> fact that the nature of the relations between the principal and the agent, and the latter and the purchaser, are such that as between the two latter, the agent is deemed to be the owner of the property. He has, as against his principal in the absence of some stipulation to the contrary, a special interest therein and the proceeds thereof, and the right to control the same till he receives his compensation for services rendered in respect thereto. Story on Agency, Section 111."

Special interest is thus seen to be the basis of the right of the factor to sue either for damage to the property or for proceeds of the sale. The reason for the rule being the special interest, the rule ceases to have application where the special interest no longer exists.

Nor does the decision in *Spiller* v. *A. T. & S. F. Ry. Co.* 253 U. S. 117 (p. 94, petitioners' brief) help petitioners. The plaintiff in that case sued on assignments which vested legal title to the claims in him. The purpose of the assignments was not important. What was important was that under the assignments, Spiller had a right to sue in his own name and right. Petitioners may also have powers of attorney, but they were not proven of record and this suit is not based on them.

A case identical in its facts with the case at bar was presented in *North American Co.* v. *St. Louis & San Francisco R. R. Company, et al.*, a receivership proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri. The Interstate Commerce Commission had awarded reparation on some cotton shipments to commission merchants in the case of *Memphis Freight Bureau* v. *St. Louis & S. F. Railway Co.* 57 I. C. C. 212.

The testimony before the Commission supporting the award to the cotton factors was substantially the same as the testimony in the case at bar, being to the effect

that the commission men presented claims for their shippers and that the railroads dealt with them in adjusting claims. The commission men filed claim in the receivership proceeding, basing their claim upon the award of the Interstate Commerce Commission. Judge Walter S. Sanborn, Circuit Judge, denied their right to prosecute and recover on the claims. The only question before him was whether they had such interest as would permit them to recover. The opinion was not reported, but a certified copy thereof is attached to the brief of the Director General herein, as an appendix thereto. In the course of the opinion, Judge Sanborn said:

> "The interveners, however, pray that the payment be made to the factors. The defendant objects that the factors were not the parties damaged. The commission so held and there is substantial—nay, conclusive evidence—that the factors did not and that the country growers and shippers did suffer and bear the substantial damage. Notwithstanding this fact, and notwithstanding the fact that the commission itself reported and found that the factors in their representative capacity were not entitled to the reparation, its subsequent order was that the receivers be authorized and directed to pay the reparation to the factors without making any reference to their representative capacity. * * *
>
> The factors insist that this court should order the amount of the reparation paid to them. But since they did not, and the growers and shippers did suffer and bear the damages the court is not persuaded that they have either the property rights in the claim for damages or the authority to release or assign them. *While, so long as a factor is engaged in discharging his active duty of paying the freight charge including the overcharge and remitting the proceeds, he may have authority to settle, compromise or release the claim of his principal for the refund of the overcharge, because during that time he has a pecuniary interest in the claim for the refund, yet; when such a transaction is completed, without more, the property right of the shipper in the claim*

for the refund becomes exclusive and the factor's right or power to release, discharge, or assign it no longer exists." (Italics ours.)

Judge Sanborn accordingly denied the right of the cotton factors to recover. Undoubtedly the rule announced by him correctly states the law. When the factor has completed the transaction, has received his compensation and has remitted the net proceeds to his principal he has no longer a pecuniary interest and is no longer in a position to prosecute in his own name claims for damage to which a principal only is entitled.

Reason supports this conclusion in the case at bar. Petitioners deny any obligation to turn any recovery over to their alleged principals. They claim the right, at least, to retain such a recovery if they see fit. Such a claim is scarcely consistent with a factorship or agency. And if petitioners did choose to retain any amount recovered, we would have the odd situation of a factor or agent benefitting by a recovery made through his representation of somebody else, the principal, meanwhile, being left to suffer. Such a situation is opposed to all reason and justice.

We submit that the decision of the District Court with respect to the right of petitioners to recover as factors and agents for the shippers was right and that it should be affirmed; assuming, of course, that the question may be made an issue in a case not brought by petitioners as factors and agents.

VI.

THE ORDER SUED ON AWARDS REPARATION AGAINST THE YARDS COMPANY ON INTRASTATE ILLINOIS SHIPMENTS, AND IS, THEREFORE, INVALID AS TO IT, SINCE THE COMMISSION HAD NO JURISDICTION TO AWARD SUCH REPARATION.

The issues raised in the complaints filed with the Commission under its Docket Numbers 9977 and 12614, in so far as reparation is concerned, are defined in the Commission's report dated June 2, 1925. (R. 147.) In that report it is stated that the complaint in Docket 9977, filed November 7, 1917, put in issue only interstate shipments. (R. 148.) It is also stated that the issues in Docket 12614 are substantially the same as those in Docket 9977, except that Docket 12614 covers shipments within the State of Illinois during the period of federal control, and includes interstate shipments from the date of filing the first complaint to the end of the reparation period. (R. 149.) It is further said (R. 149):

> "By virtue of paragraphs (c) and (f) of Section 206 of the transportation act, 1920, the complaint in No. 12614 embraces all shipments, other than those intrastate outside of the period of Federal control, which moved, during the period of two years, plus the Federal control period, which preceded the filing of the complaint. * * * The shipments embraced in the reparation claims fall into two general classes, namely, interstate shipments throughout the reparation period, including those made prior and subsequent to, as well as during Federal control, and intrastate shipments during Federal control."

Further, in making its finding in this report, the Commission said that the collection of separate charges for loading and unloading, in addition to the line-haul rates (R. 150),

> "on interstate shipments during the reparation period hereinbefore defined, and intrastate ship-

ments during the period of Federal control, was an unlawful and unreasonable practice."

It thus definitely appears from this report of the Commission that the award sued on includes reparation on intrastate shipments moving within the State of Illinois during the period of federal control. This conclusion is affirmed by Mr. Park, who testified that the amount of reparation awarded by the Commission included shipments moving in both interstate and intrastate commerce during the reparation period. (R. 225.) From the order sued on (Pltfs.' Ex. 4, R. 157 *et seq.*) it appears that in the case of each amount listed, the Director General and the Yards Company are the defendants who are required to pay.

Section 1(2) of the Act to Regulate Commerce, under which the Commission functions (Title 49, U. S. C. A., paragraphs 1 to 15a, pp. 32, 33) provides that the act shall not apply,—

> "to the transportation of passengers or property or to the receiving, delivering, storing or handling of property wholly within one state and not shipped to or from a foreign country."

The only exception to this provision is contained in Section 13 (U. S. C. A., Title 49, Sec. 1 to 15a, pp. 377, 378) where the Commission is given jurisdiction to remove a discrimination arising from the maintenance of state rates, but that section is not in issue here as it is not mentioned in any complaint nor in the Commission's order. The Commission's only other jurisdiction over state rates is that contained in Section 206(c) of the Transportation Act, shown at page 357 of the U. S. C. A. (Title 49, paragraphs 16 to end) in which the Commission is given jurisdiction to award reparation on intrastate traffic during the period of federal control, in case the

charges complained of have been collected by the President. This means that the Commission's jurisdiction to award reparation on intrastate shipments during federal control was limited to carriers under federal control. In *Pacific Lumber Company* v. *N. W. P. Railroad*, 51 I. C. C. 738, the Commission said at page 768, that the Act to Regulate Commerce governed the defendants not under federal control.

The stipulation offered in this case as Defendants' Exhibit 1 (R. 243) provides that the Yards Company was never under federal control (R. 233) and this fact also appears from the evidence and the report of the Commission dated February 11, 1919 (R. 139). The situation is, therefore, that the Commission, without having any statutory or other authority to do so, has awarded reparation on intrastate shipments during the period of federal control against the Yards Company which was never under federal control. To the extent that it has done so, its award is void as to the Yards Company.

The portion of its total award subject to this objection is not shown by any evidence. Exhibit 1-A before the Commission, offered as Exhibit 37 in the trial court (R. 283) and certified to this court, shows the point from which shipments moved, but without showing the state, and does not segregate the state and interstate shipments, nor the amount due on each class of traffic. It was the only evidence offered in the hearings before the Commission or in court to show the points of origin of any of the shipments on which reparation was asked. A representative page of this exhibit is reproduced at page 163 of the Certified Excerpts from Original Exhibits, filed herein by petitioners.

From this representative page it is obvious that the exhibit does show whether any shipment moved in intra-

state or interstate transportation. For example, there is a town named Clayton in Illinois, Indiana, Iowa and Missouri. If the third shipment on the representative sheet of Exhibit 1-A before the Commission (Ex. 37 in court) moved from Clayton, Illinois, it was undoubtedly an intrastate shipment. If it moved from Clayton in Indiana, Iowa or Missouri, it was an interstate shipment. There is no evidence of record, however, which shows what the fact was. It is only certain that to some extent, the award of reparation covers interstate shipments, and to some extent covers intrastate shipments.

Certainly, to the extent that the order of the Commission awards reparation against the Yards Company on intrastate shipments moving during the period of federal control, the order is illegal and void, since the Commission had no statutory or other jurisdiction to award such reparation. In making the order sued on, the Commission apparently assumed that the Yards Company had been under federal control, although it had previously found that this was not the case. Being invalid as to a part of the reparation awarded and the proof of petitioners not showing to what extent the award is valid, the entire order must be held invalid as to the Yards Company.

It is true that the order sued on is presumed to be valid and is prima facie evidence of the facts therein stated. The Yards Company, however, has rebutted this presumption by showing that to some extent, the Commission exceeded its jurisdictional power in making the order. The burden then rested upon petitioners to show by proper proof, either that the Commission had jurisdiction to award reparation against the Yards Company on intrastate traffic, or the amount due from the Yards Company on interstate traffic. Neither of these

things was done. The whole order must therefore be held bad as to the Yards Company, since some part of it was beyond the Commission's jurisdiction. Certainly, the entire award cannot be held valid under a finding that the Commission had jurisdiction to make part of it and no jurisdiction to make the other part. Such a holding would operate to confer upon the Commission a jurisdiction over intrastate traffic not conferred upon it by statute and denied by the courts.

This point was urged upon the District Court in the motion filed by the Yards Company for a directed verdict (R. 304), and upon the Circuit Court of Appeals. While not referred to in the opinions of either of those courts, it is a ground upon which the judgment can and should be sustained.

VII.

THE COMMISSION WAS WITHOUT JURISDICTION TO AWARD REPARATION AGAINST THE YARDS COMPANY IN ITS DOCKET NO. 9977, AND HAVING DONE SO, ITS ORDER OF DECEMBER 12, 1927, SUED ON HEREIN, IS VOID AND NO RECOVERY CAN BE HAD AGAINST THE YARDS COMPANY THEREON.

The report of the Commission dated June 2, 1925 (R. 147), defines the issues made before it under the complaints filed in Dockets 9977 and 12614. As is specifically stated, the complaint in Docket 9977 brought in issue only interstate shipments and was filed on November 17, 1917. (R. 148.) As we have also pointed out and as the Commission states (R. 148), the only complainant named in this complaint was the Chicago Live Stock Exchange, and while it was described as an association, none of the parties composing it were named

as complainants, either in the complaint itself or in the proof offered to support it.

At page 1926 of the record made before the Commission on May 20, 1919, in Docket 9977, (Defts.' Ex. 7, R. 269), counsel for the Chicago Live Stock Exchange was given permission to file a list of cattle raisers and shippers with the Examiner. This list was apparently filed, for in its report of June 2, 1925 (Pltfs.' Ex. 3, R. 147) the Commission says (R. 149):

> "On June 16, 1919, counsel for complainant transmitted to us, apparently without service on the defendants, 'a printed list of farmers, stock raisers, and shippers throughout the country who have made shipments to and from the Chicago market during the past two years and who have paid the charges under investigation in this proceeding.'"

This list was not introduced as an exhibit in Docket 9977, and as stated by the Commission and shown by the record, was never served upon the defendants in that case. The only knowledge the Yards Company has ever had of it is based on the Commission's mention of it, and the only description of it by the Commission is that it was a list of farmers, stock raisers and shippers. As such, it certainly did not include petitioners who were commission men. And in any event, the record does not show that it did contain the names of petitioners. The record does show, however, that it was not filed as an amendment to the complaint in Docket 9977. (R. 295.) It, therefore, follows that the only complainant in Docket 9977 was the Chicago Live Stock Exchange, which, as we have said, is a corporation.

The filing of a complaint by that corporation did not operate to make the commission men, petitioners here, complainants in Docket 9977, even though it was stated in the complaint that it was filed on behalf of the mem-

bers of the Exchange. (R. 245.) This exact question has been passed upon by the Commission itself. In the case of *Michigan Hardwood Manufacturers' Association* v. *Freight Bureau*, 27 I. C. C. 32, which was a complaint brought by a similar association, the Commission said at page 35:

> "In *Cattle Raisers' Asso.* v. *C. B. & Q. R. R. Co.* 10 I. C. C. 83, 104, the Commission said that the filing of a complaint by a voluntary association in behalf of its members, if it contained the necessary allegations and prayer for reparation, would be in effect a filing of a petition by the members of the association which would interrupt the running of the statute with respect to such members as of the date when the petition was filed. That case was decided in 1904, before the passage of the Hepburn amendment. The act then contained no provision of limitation. By the terms of the Hepburn amendment it is provided that no recovery shall be had unless the claim is filed with the Commission within two years from the time it accrues, and we have held upon further consideration, and reaffirm that holding here, that a voluntary association cannot by claiming reparation in behalf of its members interrupt the running of the statute. *Missouri & Kansas Shippers' Asso.* v. *A. T. & S. F. Ry. Co.* 13 I. C. C. 411. The preferring of such a petition is not a filing of the claim within the meaning of the act as now amended. The name of the person in whose behalf damages are sought must be stated."

The decision in *Missouri & Kansas Shippers' Association* v. *A. T. & S. F. Ry. Co.* 13 I. C. C. 411, cited in the *Michigan Hardwood Manufacturers' Association* decision, fully supports the latter decision, and there is no later case decided by the Commission holding to the contrary. In the *Missouri & Kansas Shippers' Association case*, the Commission discussed in some detail the requirements of the law with respect to the filing of complaints before it by associations such as the Chicago

Live Stock Exchange, and concluded its discussion by saying at page 414:

> "But when the prayer of a complaint by a voluntary association asks for more than the mere fixing of a just and reasonable rate for the future, in substitution of a rate alleged to be unjust, and demands damages for its members on account of previous shipments made by them under the rates attacked, nothing short of the affirmative compliance on the record with the requirements here indicated will be accepted by the Commission as sufficient to take such claims out of the limitation provided by law."

It must be conceded, therefore, that the only complainant before the Commission in Docket 9977 was the Chicago Live Stock Exchange. The members of that Exchange were not made complainants by the filing of the complaint and the farmers and shippers named in the list filed on June 16, 1919, were not made complainants by amendment or otherwise. And in any event, the parties named in the list are not plaintiffs in this suit.

It is true that the complaint in Docket 12614 (Defts.' Ex. 3, R. 257) filed February 25, 1921 (R. 149, 238) lists the commission men then members of the Chicago Live Stock Exchange, in paragraph 4 thereof. But it nowhere appears that those commission men, petitioners here, were members of the Chicago Live Stock Exchange in November, 1917, when the complaint in Docket 9977 was filed. Notwithstanding this fact, the order of the Commission herein sued on awards reparation in Docket 9977, to them and against the Yards Company. Certainly, the Commission had no jurisdiction to award reparation in Docket 9977 to persons, firms and corporations who were not legally before it as complainants and whose names the Yards Company did not then and does not now know.

The Commission has itself recognized its limitations in this respect in its decisions in the *Michigan Hardwood Case, supra,* and the *Missouri & Kansas Shippers' Association Case, supra.* Its construction of the statute in those cases is not plainly erroneous and must, therefore, be treated as conclusive. *New York, New Haven & Hartford Railroad* v. *Interstate Commerce Commission,* 200 U. S. 361, 401. In its decisions herein, the Commission makes no effort to take this case out of the application of the cases cited. It is only said in its report of June 2, 1925, (Pltfs.' Ex. 3, R. 149), that

> "Complainants and their shipments were identified by reason of the fact that none but members of the exchange were permitted to do business through the stockyards * * * where all such members were known."

This was a conclusion not supported by any evidence, and, moreover, does not show a compliance with the requirements of the law, as construed by the Commission. The only reparation, therefore, that the Commission could possibly have had jurisdiction to award to petitioners as against the Yards Company is that prayed for in Docket 12614. As we have said, that complaint was filed on February 25, 1921. (R. 149, 238.)

Section 16(3) of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 16 to end pp. 28, 29), provides that all complaints against carriers for the recovery of damages not based on overcharges, shall be filed with the Commission within two years from the time the cause of action accrues and not after. The amounts herein sued for were not overcharges, and under this section of the law, the only reparation which the Commission had any jurisdiction to award against the Yards Company was for amounts paid to it subsequent to February 25, 1919, two years prior to the filing of the com-

plaint in Docket 12614. This statutory limitation with respect to the filing of complaints asking for damages is jurisdictional.

In *Phillips* v. *Grand Trunk Railway*, 236 U. S. 662, this court held at page 667, that this particular statutory provision not only barred a recovery but destroyed the liability, whether a complaint was filed with the Commission or suit was brought in court. To the same effect is *K. C. S. Ry. Co.* v. *Wolfe*, 261 U. S. 133, 138, 139, and *Danzer* v. *G. & S. I. R. Co.* 268 U. S. 633, 636.

The law on this point is clear but the Commission erred in stating its jurisdiction under that law. In its report of June 2, 1925, it said (R. 149) that the complaint in Docket 12614 embraced all interstate shipments which moved within two years, plus the period of federal control, prior to the filing of the complaint, and intrastate shipments during federal control. We have heretofore shown that the Commission had no jurisdiction to award reparation against the Yards Company on intrastate shipments moving at any time, since it was not under federal control.

It is also true that as to the Yards Company, the two year period prescribed in Section 16 of the act was not extended by the period of federal control. Paragraphs (c) and (f) of Section 206, Transportation Act, 1920 (U. S. C. A. Title 49, Sec. 16 to end, pp. 357, 358) apply only to carriers which were under federal control. The Yards Company was never under federal control. (R. 139, 233.) The two-year limitation therefore remained effective as to claims against it.

For the reasons assigned, the Commission had no jurisdiction or authority to award reparation against the Yards Company in Docket 9977. Such a conclusion is not only supported by law, but by reason and justice.

The practice before the Commission is looser than that in courts of law, but no looseness of practice can justify the allowance of a recovery by parties who are not named in the complaint; who are not otherwise of record and whose identity is not disclosed by the record and is not known to the defendant.

The extent to which the award of the Commission is void because allowed in Docket 9977, cannot be determined from the record. The report of the Commission dated May 14, 1928 (Pltfs.' Ex. 5, R. 210) states that the record does not show the dates on which the payment of the charges assailed was made (R. 211), and such a record of payment is necessary in order to determine what part of the award might properly have been allowed in Docket 12614. The burden was upon petitioners seeking to sustain the award to make this proof. The prima facie effect of the order sued on was rebutted by the Yards Company through its showing of a lack of jurisdiction on the part of the Commission to award reparation against it in Docket 9977. It was, therefore, incumbent upon petitioners to supply the proof necessary to make a proper division, as between Dockets 9977 and 12614, of the total amount of reparation awarded by the Commission, and since they have failed to do this, no part of the award can be sustained.

This necessarily follows, as that part of the award made under Docket 9977 was made by the Commission without jurisdiction, and that jurisdiction cannot be conferred by a failure on the part of petitioners to supply necessary proof. This point was urged in the District Court (R. 302) and Court of Appeals and although not mentioned in the opinions filed by those courts, we submit, nevertheless, that it requires an affirmance of the judgment herein.

VIII.

THE COMMISSION DID NOT HAVE BEFORE IT ANY COMPETENT EVIDENCE UPON WHICH IT COULD DETERMINE THE AMOUNT OF THE REPARATION AWARDED BY IT AND THE ORDER AWARDING SUCH REPARATION IS THEREFORE VOID.

This suit is to collect the specific amounts listed in the Commission's order of December 12, 1927 (Pltfs'. Ex. 4; R. 157 *et seq.*) and therein said to be due from respondents to the individual petitioners. The only evidence which the Commission had before it and upon which it could possibly have based its order of December 12, 1927, in so far as the amount said to be due each petitioner is concerned, was an exhibit identified as Exhibit 1-A, which was offered and received in evidence on the hearing held by the Commission on October 3, 1922. (Defts.' Ex. 9; R. 270.) Exhibit 1-A before the Commission was received in evidence on the trial of this case as Defendants' Exhibit 37 (R. 283), and consists of some thousands of sheets purporting to show that detail with respect to individual shipments which the Commission had to have in order to make such an order as its order of December 12, 1927. This exhibit has been certified to this court as an original exhibit. A representative sheet is shown at page 163 of the Certified Excerpts from Original Exhibits, filed by petitioners herein.

The exhibit was initially delivered to the Commission in Docket 9977, on February 25, 1921 (R. 226), the same day the complaint in Docket 12614 was filed. At that time, it was not filed during the course of any hearing, was not accompanied by any testimony, was not filed as an exhibit, was not served upon any defendant, and was in no way identified. The testimony upon which the ex-

hibit was received in evidence by the Commission was given by Mr. Park. On the hearing of July 14, 1921 (Defts.' Ex. 8, R. 269), held after the exhibit had been deposited with the Commission the following occurred (p. 105):

"Mr. Hillyer: Have you prepared a list of shipments of live stock to the Chicago market upon which shipments the loading charges condemned in Docket 9977 was assessed?

Mr. Park: I have."

At page 108 of the same record, the following occurred:

"Mr. Hillyer: In getting this information that you placed upon those statements what record did you take it from?

Mr. Park: From the records of the Commission, firms and the Stock Yard Company."

At page 118 of the same record Mr. Park stated that the document was taken from the books of the commission men and in some instances from stockyards records, and at page 119 he said that the document was made from the waybills of the railroads and in part from other records; that it was made by him and under his supervision. Upon the trial of this case, Mr. Parks also testified that he made up a statement showing the detail of the shipments made, using the original records of the commission firms (R. 220); that the information he used in getting up the statement was secured from the bills, records and check stubs of the commission men (R. 229).

The statement thus referred to was then identified by the witness as being the one filed with the Commission on February 25, 1921 (R. 226, 227) and subsequently introduced in evidence before the Commission as Exhibit 1-A (R. 220, 221, 227). At the time of the hearing on July 14, 1921, the document in question had not been introduced in evidence upon any hearing, and the Yards Company knew nothing about it, although Mr. Park had

apparently filed it with the Commission on February 25, 1921.

Upon the basis of Mr. Park's identification of the document, as contained in his testimony on the hearing of July 14, 1921, and which we have quoted, petitioners' counsel offered it in evidence at the hearing before the Commission on October 3, 1922. (Defts.' Ex. 9, R. 270.) At pages 42 and 43 of that transcript, counsel said:

> "I offer, Mr. Examiner, as our exhibit in this hearing the complete claim statement showing every shipment under the form I have indicated here upon which the unlawful charge was paid. I offer that as part of the record in the case."

To this statement, counsel for the Yards Company replied:

> "I object to the offer on behalf of the Union Stock Yard & Transit Company as being incompletely and irrelevantly proved and there has been no sufficient identification to make the offer competent as regards that document."

The Examiner then said:

> "It will be received as Exhibit 1-A, and counsel for defendants will be allowed the opportunity to go through it item by item and call for the witnesses who have purported to have received the individual shipments for such cross-examination as is competent and relevant."

To this statement of the Examiner, counsel for the Yards Company replied:

> "These complainants are making a claim for money. The way for them to prove their case is to put their own people on the stand and prove it by competent evidence or we object to it on the ground that it is incompetent and improperly proved."

Notwithstanding these objections, the document thus identified in Mr. Park's evidence was received in evidence and marked "Exhibit 1-A." After it was received, each

witness called by complainants was interrogated with respect to it. We can best illustrate what was done by quoting from the testimony of a few of the witnesses. At page 228 of the hearing on October 3, 1932 (Defts.' Ex. 9, R. 270) witness Kennedy testified as follows:

"Q. Were the books and records of your firm turned over to Mr. Park and his assistants for the purpose of preparing your claim for reparation in this case?

A. Yes, sir.

Q. Approximately how much is your claim?

A. About $6,300."

Thereupon the witness was shown and identified a few of the shipments appearing on one of the sheets of Exhibit 1-A, and then made the statement that they were representative of all of his shipments included in that exhibit. The following then occurred at pages 239 and 240 of the transcript:

"Q. Have you made any check of Exhibit 1-A, which is on the table here, of all the shipments shown therein as arriving at the yards and consigned to your company?

A. We had Mr. Park prepare the claims from our records. Personally I have not checked it.

Q. You know nothing about the contents of this Exhibit 1-A which Mr. Park made up; you made no check of it?

A. No, sir."

At pages 243 and 244 of the same transcript, witness Sherwood testified as follows:

"Q. Were the books and records of your firm turned over to Mr. Park and his assistants for the purpose of preparing your claims for reparation in this case?

A. They were.

Q. Can you tell us approximately the amount of the claim that you have?

A. It amounts to approximately 13,500 cars that

we handled or around $3,600 or $3,700, approximately that."

The witness then identified a few shipments on one sheet of Exhibit 1-A as being representative of all shipments to his firm, and further testified at page 247 of the transcript:

"Q. Are the claim statements prepared under your authority correct to the best of your knowledge and belief in so far as they include all the shipments consigned to your company?"

To this question, respondents objected on the ground that the witness was not qualified to answer. The objection was overruled, whereupon the witness testified at page 248:

"They are."

On cross-examination, at pages 248 and 249 of the transcript, this same witness testified as follows:

"Q. What statements are you referring to when you said the claim statements were correct?

A. The statement Mr. Park fixed for us.

Q. The sheet marked Exhibit 1?

A. Exhibit A, yes.

Q. Have you checked over Exhibit 1?

A. Through Mr. Park we have.

Q. Have you done it yourself?

A. I have done part of it and we turned over the books and everything we had for the rest of it.

Q. What I am getting at is this: Is Exhibit 1-A on the table? Have you checked over these documents?

A. I sent in the data from which he made the documents.

Q. You gave him the books and he made Exhibit 1-A from the books?

A. He made Exhibit 1-A from the books, yes.

Q. You have not checked over Exhibit 1-A subsequently to ascertain whether it correctly shows what your books show?

A. No."

The foregoing is representative of the testimony offered on this point by each witness produced by petitioners. Practically every witness testified as to the approximate amount of his claim, and over objection was then permitted to testify that the amount of his claim was correctly shown in Exhibit 1-A, prepared by Mr. Park. The testimony of Mr. Park, which we have quoted, and the statements of the witnesses, of which we have quoted representative examples, constitute all the evidence which was offered by petitioners to qualify the exhibit as evidence in the case.

We submit that under the facts of record, Exhibit 1-A (Defts.' Ex. 37 in this court) should not have been received in evidence by the Commission. It affirmatively appears that the exhibit was made by Mr. Park or his assistants from certain other records which he had secured from the commission men, from the railroads, and perhaps from the Yards Company. There was no testimony whatsoever with respect to the records used as a basis for the exhibit. In fact, all the records used were not even identified, beyond the statement that they were records. The people who helped Mr. Park make the exhibit up are not identified beyond the statement that they were his assistants. It does not appear whether the exhibit was a copy of the records used or was a compilation made from them. None of the original records were produced or identified by any witness nor was there any evidence whatsoever with respect to them. While each witness did undertake to testify that the exhibit was correct, it affirmatively appeared from their cross-examination that none of them had examined it or knew anything about it. For these reasons, respondents objected to the receipt of the exhibit in evidence by the Commission and also objected to the testimony of each

witness with respect thereto. Its receipt in evidence and use in making the order of December 12, 1927, was a flagrant disregard of respondents' rights and makes the order void.

In *Spiller* v. *A. T. & S. F. Ry.* 253 U. S. 117, a substantially similar question was presented. In that case also, there was introduced in evidence before the Commission a summary of shipments based upon the records of the commission merchants and which was used by the Commission as a basis for the award subsequently made. At page 130 this court said:

> "The evidence was not objected to as hearsay when introduced, nor, indeed, at any time during the hearing before the Commission."

In this case, at the time Exhibit 1-A was offered in evidence, the Yards Company strenuously objected to it on the ground that it had not been sufficiently proven and was incompetent and hearsay. Moreover, the same objection was made to the testimony of every witness who undertook to qualify it as being a correct statement of fact. In the *Spiller Case,* the summaries in question had also been submitted to the carriers for investigation and were verified and approved by them. With respect to this feature of the matter, this court said at page 128:

> "No reparation was awarded by the Commission except with respect to such shipments as were acknowledged in the reports of the defendants to have moved as stated."

That is not true in this case. On the contrary, the report of the Commission, dated May 14, 1928 (Pltfs.' Ex. 5, R. 210) and the order accompanying it, shows definitely that the Yards Company never did verify or approve any statements submitted by petitioners. Moreover, upon the trial of the *Spiller Case* in the lower court, the entire record before the Commission was not pro-

duced. With respect to this feature of the case, this court said at page 125 of its opinion:

> "But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced."

In the case at bar, the entire record before the Commission was produced in court, including the Exhibit 1-A which we are discussing. This is conceded by petitioners and is shown to be so by the stipulation introduced as Defendants' Exhibit 1 (R. 243), when considered in connection with the other exhibits offered. It thus appears that none of the reasons which existed in the *Spiller Case, supra,* for receiving the statement in question exist here. In speaking of the right of the Commission to receive evidence of this character, this court said in the *Spiller Case,* at page 126 of its opinion, referring to the provisions of the Act to Regulate Commerce:

> "These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence."

Certainly, it will not be denied that the ascertainment by the Commission of the exact amount due to each petitioner was an essential fact necessary for the Commission to determine. Nor can it be denied that under the foregoing language, this fact with respect to each petitioner had to be based upon substantial evidence. Respondents were certainly entitled to know through competent evidence how much was claimed from them by each petitioner. The receipt of some incompetent evidence on this subject would not vitiate the award, pro-

vided that there was sufficient good evidence upon which the award could be based. Necessarily, however, there had to be sufficient good evidence to justify an order.

The only proof on the question of the amount claimed by each petitioner is contained in Exhibit 1-A. At no other place in the record is there any evidence upon which the Commission could possibly have based the order here sued on. It is the only evidence offered which purports to show the detail contained in the order of December 12, 1927. Each witness for petitioners did state the approximate amount of his claim, but referred to the exhibit for a statement of the exact amount.

From the foregoing, it results that the receipt of this exhibit in evidence by the Commission and its subsequent use in making the order of December 12, 1927, denied a fair hearing to respondents and amounted to a denial of due process. Certainly, defendants have some rights in proceedings before the Commission. Respondents had the right in this case to know how much was claimed from them by each petitioner and they were entitled to have this fact shown by competent testimony given by a qualified witness. Such testimony, however, was not forthcoming.

We submit that the objections made in the proceedings before the Commission to the receipt in evidence of Exhibit 1-A and the objections to the testimony of the witnesses who testified with respect thereto, should have been sustained, and that the exhibit itself should not have been received in evidence. It results that the order of the Commission herein sued on, being necessarily based upon Exhibit 1-A, cannot be sustained. This point was urged in the District Court and Circuit Court of Appeals, and while not referred to in the opinions of those courts, we submit that it requires an affirmance of the judgment herein.

IX.

THE REPARATION AWARD HERE SUED ON IS VOID BECAUSE THE COMMISSION, IN MAKING IT, CONSIDERED EVIDENCE NOT IN THE RECORD BEFORE IT.

In its report of May 14, 1928 (Pltfs.' Ex. 5, R. 211) the Commission refers to the fact that respondents refused to verify the statements submitted to them by petitioners under Rule V of the Commission's Rules of Practice (Defts.' Ex. 45, R. 291). It is then said (R. 211) that petitioners filed statements with the Commission containing the essential information called for by Rule V of the Rules of Practice, some of which statements were verified by the defendant carriers; that tabulated statements and summaries were filed with the Commission showing the amounts of reparation due each petitioner and that after these summaries were checked upon the record, its order of December 12, 1927 was issued.

As we have pointed out, the entire record made before the Commission in the hearings held by it was introduced in the trial court and is now before this court. Nowhere in this record appear the "statements", "tabulated statements" or "summaries" referred to by the Commission in its report of May 14th. It is certain that these statements and summaries were submitted to the Commission after the last hearing held by it, since it appears from the Commission's report of May 14, 1928 (R. 211) that they were filed with it subsequent to its report of June 2, 1925 (Pltfs.' Ex. 3, R. 147 *et seq.*) and the last hearings were held by the Commission in February, 1923 (Par. 40, Defts.' Ex. 1; R. 239, 243). Obviously then, the Commission in getting up its order of December 12, 1927 (Pltfs.' Ex. 4, R. 157 *et seq.*), the reparation order

sued on herein, considered evidence which could not have been in the record. Under these circumstances, the order of December 12, 1927 is void.

This precise question was passed upon by this court in *United States, et al.* v. *A. & S. Ry. Co. et al.* 265 U. S. 274. In that case the finding of the Commission rested in part upon data taken from the annual reports filed with the Commission by the railroads, but which reports were not formally put in evidence. This court said at page 287:

> "The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice."

And on page 288 this court said:

> "But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. *New England Divisions Case,* 261 U. S. 184, 198, note 19. Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91, 93; *Chicago Junction Case,* 264 U. S. 258."

At page 290, this court concluded its discussion of the matter by saying:

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

To the same effect are the decisions in *I. C. C.* v. *L. & N. Ry.* 227 U. S. 88, 91, 92; *Chicago Junction Case,* 264 U. S. 258, 263, and *C. R. I. & P. Ry.* v. *U. S.* 274 U. S. 29, 33.

It is plain that the statements and summaries referred to by the Commission in its report of May 14, 1928

(Pltfs.' Ex. 5, R. 210 *et seq.*) were used as evidence of facts which it was necessary to prove, for that report of the Commission states that after they had been checked upon the record, it issued its order of December 12, 1927. Moreover, no one could deny that proof of the amounts due each petitioner was an essential element of petitioners' case.

Nor does the statement in the Commission's report of May 14, 1928, that the summaries were "checked upon the record" affect the legal proposition. The only part of the record with which these summaries could possibly have been checked is the Exhibit 1-A offered by petitioners upon the hearing of October 3, 1922, and which, as we have heretofore shown, was improperly received in evidence. The checking of statements which were not in the record, with an exhibit that should not have been in the record, affords no legal foundation for the use of those statements as the basis for the issuance of an order.

Respondents were entitled to know upon what the Commission based its order. It was their right to have petitioners introduce all evidence which was to be given consideration in the case, in open hearing with notice to them. The requirements of the law are certainly not satisfied by the submission to the Commission, after the record has been closed, of statements and summaries which, as appears from the Commission's own reports, were used as a basis for issuing the award sued upon. Upon no theory of the law can an award of reparation founded upon such a basis be sustained. This point was urged in the District Court and Circuit Court of Appeals, and while not mentioned in the opinions of those courts, it nevertheless requires an affirmance of the judgment.

Conclusion.

In concluding their brief, petitioners suggest a reversal of the judgment herein because of the time and money that has been spent by petitioners in prosecuting this claim. No mention is made of the money which the Yards Company has been required to spend and of the work which it has been required to do in retaining charges which were lawful when collected, have never been declared to be unlawful and which the Yards Company has every right to retain. It is reasonably certain that the Yards Company has spent as much money and effort in trying to keep what belongs to it as petitioners have spent in trying to get something to which they are not entitled.

There is nothing technical in the grounds upon which the District Court and the Circuit Court of Appeals decided the case contrary to petitioners' contentions. The decisions of those courts went directly to the root of the whole case. It is difficult to imagine more fundamental objections to a claim for damages than those upheld by both lower courts. The uncontroverted facts in this case, so far as the Yards Company is concerned, are that it collected only amounts which it not only had a right to collect but was required to collect under the theory of the Commission itself in order to avoid incurring a criminal liability. If it is now required to refund any part of those charges, it will be required to give up something to which it has a valid right. It will be put in the position of being required to perform what the Commission says is a transportation service, for less than its lawful tariffs authorize and require it to collect.

As we read petitioners' brief, its claim against the Yards Company is based entirely upon the allegation

that the Yards Company connived with the Director General in the collection of alleged unlawful charges from petitioners. That this argument is not good results from the facts that the charges were not collected from petitioners and that they were not unlawful. Petitioners have advanced no arguments which justify the conclusion that the Yards Company should sustain a loss in order that petitioners may profit by the payment to them of compensation for an injury which they have not sustained.

We submit that the judgment should be affirmed.

Respectfully submitted,

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